Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NO. 95-

ROBERT COHEN,

PETITIONER

v.

UNITED STATES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether, in conflict with this Court's decision in *Zafiro v. United States*, 113 S. Ct. 933 (1993), the petitioner's due process rights were violated by denying his motions for severance so that he could present the essential, exculpatory testimony of a co-defendant.

II. Whether the petitioner's constitutional right to testify in his own defense was violated when the trial court struck, *sua sponte*, the critical portion of the testimony of a defense witness after evidence had concluded and after all defense counsel except petitioner's had delivered their closing arguments, where the petitioner had elected not to testify in justifiable reliance upon the court's earlier ruling that the witness's testimony was admissible.

III. Whether the petitioner's sentence violates the *ex post facto* clause of the United States Constitution by imposing a four level enhancement for jeopardizing the soundness of a financial institution pursuant to a November 1, 1990 amendment to U.S.S.G. § 2F1.1(b)(6)(A), when the financial institution made all of the loans prior to November 1, 1990.

PARTIES TO THE PROCEEDING

In addition to the named parties, Ambrose Devaney and James K. Smith were appellants in the United States Court of Appeals for the First Circuit. Richard D. Mangone was a defendant at trial in the United States District Court for the District of Massachusetts, and was convicted, but failed to appear at sentencing and remains a fugitive.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Robert Cohen hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this criminal case.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit (App. A, *infra*, 1a-37a) is reported at 46 F.3d 1223 (1st Cir. 1995).

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on February 10, 1995. The petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc* on February 24, 1995. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on April 7, 1995. App. B., 38a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

Attorney Robert Cohen and three codefendants -- his former clients -- were convicted of crimes arising out of a series of loans made by the Barnstable Community Federal Credit Union ("Barnstable"), with the participation of the Digital Credit Union ("Digital"), between 1985 and 1990. The codefendants were two Barnstable founders and former officers (Richard Mangone and James Smith), and a Cape Cod real estate developer (Ambrose Devaney). Beginning in 1985, Mangone, Smith, and Devaney, who were involved in real estate development projects on Cape Cod, sought to purchase properties and finance their construction with loans from Barnstable, without disclosing their interest in the projects.

Mr. Cohen, who also served as counsel to Barnstable, advised his clients that such loans would be lawful under *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974), through the use of "nominee" trusts. Under the terms of a nominee trust, Mangone, Smith, or Devaney could act as beneficiaries and receive the loan proceeds from the nominal borrower, who would serve as trustee and act at their direction. At the time the loans were made, no statute, regulation, or policy of Barnstable, Digital, or the National Credit Union Administration ("NCUA") required disclosure of the beneficiaries' identities to the lender. Subsequently, between

1985 and 1990, Barnstable made several real estate loans to trustees of nominee trusts at which Mr. Cohen was the closing attorney.

In March 1991, Barnstable failed and was taken over by the NCUA. Two days later, Mangone, Smith, and Lynn Vasapolle, the Barnstable manager, went to Mr. Cohen's office and confessed to him that they had prepared false financial statements of borrowers/trustees, who in some instances were not creditworthy. During the discovery process, it became apparent that Mangone, Smith, and Vasapolle also had falsified purchase and sale agreements to inflate the value of the properties and the loans, and had altered or forged certificates of beneficial interest to conceal completely the interest of Mangone, Smith, and Devaney in the loans.[1/]

At trial, the government attributed to Mr. Cohen falsification of certificates of beneficial interest for two of the seven trusts at issue in the indictment. The government also alleged that Mr. Cohen was part of the Mangone-Smith-Devaney scheme because he served as trustee and beneficiary of a third trust -- the New Adventures Realty Trust. Those acts became the foundation of the government's case against Mr. Cohen. Vasapolle served as the government's chief witness at trial, testifying pursuant to a plea agreement.

Prior to trial, Mr. Cohen had moved to sever his trial from that of co-defendant Smith, his former client, so that Smith could appear as a defense witness at Mr. Cohen's trial.

[1/] The evidence showed that a certificate of beneficial interest is a document, signed by the trustee and the beneficiaries, which identifies the persons who have a beneficial interest in the trust and establishes the rights and responsibilities of the beneficiary to another.

App. C, 40a; App. D, 47a; App. E, 49a; App. F, 53a. Mr. Cohen filed two affidavits, executed by Smith, stating that Smith would testify at a separate trial and describing the substance of Smith's exculpatory testimony. App. G, 57a; App. H, 60a. Smith would have testified, *inter alia*, that Mr. Cohen never agreed to disguise the trusts' beneficiaries. Moreover, Smith averred that Mr. Cohen sent true certificates of beneficial interest to Vasapolle at Barnstable, that Vasapolle told Mr. Cohen that Barnstable did not need them, and that Vasapolle threw them away. Smith also would have testified that the arrangement by which Mr. Cohen became beneficiary of New Adventures Realty Trust was merely part of a workout among Mangone, Smith, and Devaney, so that Devaney could be extricated from the projects, and not because Mr. Cohen was part of a scheme to defraud Barnstable or Digital. And, as explained below, at a severed trial, Smith would have contradicted numerous other aspects of Vasapolle's testimony implicating Mr. Cohen.

The district court found that, through Smith's affidavits, Mr. Cohen had satisfied the criteria for a severance which the First Circuit set forth in *United States v. Drougas*, 748 F.2d 8, 19 (1st Cir. 1984). Nevertheless, the court declined to sever, on the basis of judicial economy and Mr. Cohen's ability to testify. Mr. Cohen repeatedly renewed his motion to sever during the course of the trial. *E.g.*, App. I, 63a. The court denied the renewed motions.

On the last day of evidence, Mr. Cohen sought to present the testimony of Richard Huber, Professor Emeritus of Law at Boston College Law School. Professional responsibility was among the courses that Professor Huber taught. Within days of learning of his clients' crimes, Mr. Cohen had sought Professor Huber's advice about whether he

could disclose what he had learned.[2/] Professor Huber told him that because his clients' confessions were privileged he could not disclose them, and, accordingly, he did not.

Mr. Cohen called Professor Huber as a witness. Counsel for Smith told the court that Huber's testimony raised issues of possible severance and mistrial. The court told Smith's counsel that it would give a limiting instruction to the jury, stating that the evidence was admissible only as between Mr. Cohen and the government.

Mr. Cohen's counsel then examined Professor Huber. He testified that Mr. Cohen met with him on April 4, 1991 and told him that on March 23, three clients had met with Mr. Cohen and disclosed their various misdeeds. Mr. Cohen told him of the confessions of Mangone, Smith, and Vasapolle -- that "certain documents had been changed, the information had been changed, figures had been changed . . ., that this had been done after preparation by Mr. Cohen . . . that there may have been forgeries." Professor Huber confirmed that Mr. Cohen asked him if Mr. Cohen could ethically disclose their conduct to his other client, the banking institution. Professor Huber testified that, after a lengthy conversation, he advised Mr. Cohen that he could not reveal the communications unless he needed to defend himself against civil or criminal charges.

Immediately after Huber's testimony, Mangone and Smith moved for a mistrial, citing this Court's decision in *Bruton v. United States*, 391 U.S. 123 (1968). The court deferred addressing the motion. Mr. Cohen rested without testifying. The court postponed consideration of the mistrial

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[2/] Mr. Cohen sought Huber's advice upon the recommendation of Mr. Cohen's son, who, at the time, was a student at the law school.

motion and other matters until after closing arguments the following day.

The following morning at side bar, after all closing arguments but Mr. Cohen's had been delivered, the Court suddenly and unexpectedly instructed Mr. Cohen's counsel that Mr. Cohen's statements to Professor Huber would be stricken and that counsel should not refer to them in closing argument. The Court, however, did not strike the Government's cross examination of Huber, which the jury was permitted to consider. On cross, the government had argued its case through Professor Huber, suggesting that Mr. Cohen had not revealed his complicity in the scheme to defraud Barnstable.

Counsel for Mr. Cohen strenuously objected and told the court that the statements Mr. Cohen made to Professor Huber were critical to his defense; he protested that he would have to revise his closing argument, the central theme of which was Mr. Cohen's meeting with Huber. The court directed counsel to proceed with argument despite counsel's protest that he would have to rework his closing argument. Mr. Cohen's counsel completed a portion of his argument, and trial was recessed.

At the hearing on mistrial and severance motions that afternoon, the court explained that it was striking that portion of Professor Huber's testimony describing Mr. Cohen's statements because of the *Bruton* problem. Counsel for Mr. Cohen moved for a mistrial and stated that, had the court announced its intention to strike the exculpatory portion of Professor Huber's testimony while the evidence was still open, he would have advised Mr. Cohen to testify in his own defense. Counsel told the court that Mr. Cohen's decision not to testify was based in part on the fact that the entire Huber-Cohen conversation had been admitted.

The following morning, the court acknowledged receipt of a handwritten affidavit signed by Mr. Cohen and filed prior to the commencement of proceedings that day. The affidavit stated that, had Mr. Cohen known of the court's intention to strike Professor Huber's testimony, he would have testified. App. J, 65a.[3/] Nevertheless, following the completion of closing arguments, the court instructed the jury to disregard Professor Huber's testimony about what Mr. Cohen said to him regarding other persons. Mr. Cohen objected to the instruction.

On July 8, 1993, the jury found Mr. Cohen guilty of conspiracy, seven counts of bank fraud, and two counts of engaging in financial transactions with the proceeds of specified unlawful activity (bank fraud)). Mangone, Smith, and Devaney were found guilty of all or some of the counts alleging the same offenses; Mangone was also convicted of unlawful receipt of benefits by a credit union official. On October 20, 1993, the lower court denied new trial motions that each defendant had filed. On March 15, 1994, the court imposed a sentence on Mr. Cohen totalling 120 months incarceration and ordered restitution. The lower court's calculation of the Guideline Sentencing Range employed the November 1, 1993 *Sentencing Guidelines Manual*, and included a four level enhancement for jeopardizing the soundness of a financial institutions. Mr. Cohen filed a Notice of Appeal on March 15, 1994. Judgment was entered on March 28, 1994.

On appeal, Mr. Cohen contended, *inter alia*, that the joint trial deprived him of Smith's exculpatory testimony. Specifically, he argued that, in denying his motions for

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[3/] Mr. Cohen submitted a second affidavit in connection with his motion for a new trial. App. K, 66a.

severance, the district court gave too much weight to concerns about judicial economy. He also argued that the lower court, in violation of his Fifth Amendment rights, impermissibly considered his ability to testify to the same matters as Smith. The appeals court recognized that judicial economy should not be dispositive; that a defendant's ability to testify is an improper consideration; and that Smith's affidavits were not without exculpatory value. Nevertheless, it held that the denial of severance was not an abuse of discretion because Smith's proffer ultimately was inadequate in relation to Mr. Cohen's theory of defense.

Mr. Cohen also argued that the striking of Professor Huber's testimony deprived him of his right to testify. Mr. Cohen argued that his first affidavit, averring that he "would have chosen to testify" had he know that his testimony was necessary for the admission of Huber's entire testimony, was the "functional equivalent" of a motion to reopen the evidence (assuming such a motion was required). He also argued that the district court should have inquired whether he wished to testify. The appeals court, however, held that nothing in the affidavit or counsel's arguments to the district court suggested that Mr. Cohen still wished to take the stand.

Finally, on appeal, Mr. Cohen argued that the district court violated the *ex post facto* clause of the Constitution by imposing a four-level enhancement under U.S.S.G. § 2F1.1(b)(6)(A) for conduct jeopardizing the safety and soundness of a financial institution. The appeals court held that although all of the loans in the indictment had closed by the November 1, 1990 enactment date of § 2F1.1(b)(6)(A), there was evidence that the offense of conviction continued into early 1991.

Reasons for Granting the Petition

1. The denial of severance in this case conflicts with this Court's decision in *Zafiro v. United States*, 113 S. Ct. 933 (1993). There, this Court stated that, ordinarily, persons indicted together should be tried together and a severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 938. The *Zafiro* Court recognized, however, that in certain circumstances, a severance is compelled. For example, the Court observed that "a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Id.*

The appeals court decision conflicts with *Zafiro* because it denied Mr. Cohen the essential exculpatory testimony that James Smith would have provided at a separate trial. The First Circuit noted that, in denying severance, the district court relied primarily upon the factors authorized by *United States v. Drougas*, 748 F.2d 8, 19 (1st Cir. 1984). There, the appeals court established the criteria for severing the case of a defendant so he may have the benefit of a co-defendant's testimony:

> In order to be entitled to a severance on the basis of a codefendant's testimony the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. Given such a showing, the court should (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) consider

> whether the testimony would be subject to substantial, damaging impeachment; (3) assess the counter arguments of judicial economy; and (4) give weight to the timeliness of the motion.

748 F.2d at 19. The district court ruled that the first four *Drougas* criteria were met. It denied severance for several reasons. First, it opined that Mr. Cohen himself could testify to most of the things as to which Smith could testify. Second, it considered the need for judicial economy. Finally, the district court observed that Smith's proposed testimony was "more circumstantially than directly" exculpatory. For these three reasons, severance was denied. The First Circuit's decision sanctioned the district court's action.

The appeals court's decision is at odds with *Zafiro*. The record is clear that the district judge improperly considered whether or not Mr. Cohen could testify to the things as to which Smith proposed to testify. The record is clear that the lower court gave disproportionate weight to the needs of judicial economy. The appeals court's treatment of the exculpatory nature of the proposed Smith testimony is unfair and does not accurately reflect the record. The decision adopts the lower court's analysis that the exculpatory value of Smith's testimony was "merely" circumstantial. This is an unfair reading of the record. The government's case was almost wholly circumstantial. The issues in dispute were Mr. Cohen's knowledge and intent. The proof of Mr. Cohen's knowledge and intent was circumstantial, and Smith's proposed testimony would have rebutted the government's case.

Moreover, the decisions of both the district court and the appeals court overlooked the truly exculpatory effect of

Smith's proposed testimony. Smith's affidavits would have been exculpatory in the following respects:

- Vasapolle testified that Mr. Cohen sent her only one closing book.[4/] Smith would have testified that Mr. Cohen sent "closing packages" to Vasapolle, and that in 1989 Vasapolle instructed Mr. Cohen that Barnstable would not in the future require Mr. Cohen to forward certificates of beneficial interest. App. H at 60a. This would have undermined Vasapolle's testimony that it was Mr. Cohen who told her what documents should be maintained in Barnstable's files. The appeals court's decision itself repeats this bit of Vasapolle's testimony in the course of its decision. 46 F.3d at 1239.

- Smith would have testified that Mr. Cohen acted as a temporary beneficiary on the New Adventures Realty Trust as an accommodation to the co-defendants, since Devaney was trying to extricate himself from the trust. App. H at 61a. This would have rebutted the government's claim that there was something nefarious in Mr. Cohen's dealings with New Adventures. Again, the panel's decision relies on evidence about Mr. Cohen's role in that transaction. *Id.* at 1229, 1239.

[4/] The evidence showed that Mr. Cohen's office prepared closing books for a number of the transactions. The books were bound compilations of some of the documents relating to the particular transaction.

- Smith would have testified that Vasapolle altered and removed documents from Barnstable. App. H at 61a.

- The government's theory was that Mr. Cohen devised a scheme to conceal the identity of the beneficiaries of the real estate trust from federal regulators. Smith would have testified that he knew of no agreement in which Mr. Cohen agreed to conceal the identity of the recipient of the loan funds in question. App. G at 58a. Such testimony, from a former client, and a leader of the conspiracy, would have had a dramatic effect on the jury.

- The government presented evidence that various trustees were told that they were not liable on the notes which they signed, since they had been indemnified by the beneficiaries of the trust. This was an important issue at trial, since Mr. Cohen sought to show that his legal advice comported with the First Circuit's decision in *United States v. Gens*, 493 F.2d 216 (1st Cir. 1974). Smith would have testified that at each closing he attended (the record reveals that he attended most), Mr. Cohen specifically informed the trustees that they were personally liable for repayment of funds borrowed in their names. App. G at 58a. That missing testimony was especially important because it is unlikely that Mr. Cohen would have made such statements to persons whom he knew to have had little net worth.

- The government's chief witness, Vasapolle, testified that at a meeting in Barnstable immediately after the takeover of the credit union by federal regulators, Mr. Cohen remained mute and acquiescent when Smith and Mangone discussed the need to destroy documents. Smith would have testified that at that meeting "Mr. Cohen told all present that no documents, under any circumstances, could be removed from any files or offices since this would be a violation of law." App. G at 57a-58a.

- Smith would have testified that Vasapolle received "large amounts of monies" from one of the co-defendants. App. H at 61a-62a. This would have undermined the credibility of the government's chief witness.

Finally, the appeals court's decision obfuscates the dramatic impact of a client appearing as a witness on behalf of his lawyer. In deciding whether severance is appropriate, courts have recognized the peculiar circumstances that arise when an attorney must face trial with his former clients. *See United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965) (Court erred in failing to sever Echeles's case (an attorney) from that of his co-defendant — Echeles' former client — so that the former client could exculpate Echeles); *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir. 1979) (State trial court denied due process right of Tifford — an attorney — in failing to sever Tifford's trial from that of a co-defendant who offered to testify on Tifford's behalf at a severed trial); *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973). *Tifford* was recently cited with approval in *Zafiro*, 113 S. Ct. at 938. This line of cases accentuates the sensitivity of the issue in this case; the

appeals court's decision simply ignores this important relationship.

The law is clear that severance is the exception rather than the rule. There comes a point, however, when, in accordance with *Zafiro*, a court is compelled to concede that a defendant's due process rights have been violated by the failure to grant a severance to present a co-defendant's essential, exculpatory testimony. This is such a case.

2. The timing of the striking of Professor Huber's testimony, and its effect on Mr. Cohen's decision not to testify, conflicts with this Court's decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), and deprived Mr. Cohen of the constitutional right to testify in his own defense. Unquestionably, Mr. Cohen had the right to testify in his own defense. 18 U.S.C. § 3481 (1985). That right is constitutionally based. *Rock v. Arkansas,* 483 U.S. 44 (1987). It springs from the Due Process Clause, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975), *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961), the Compulsory Process Clause of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 17-19 (1967), the right personally to make a defense, *Faretta v. California*, 422 U.S. at 819, and the right against compelled testimony. *Harris v. New York*, 401 U.S. 222, 230 (1971).

In *Brooks*, this Court recognized that a defendant can only make the decision whether to testify with the advice of his counsel on the basis of a full record:

> Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. They may collapse under skillful and persistent cross-examination, and through no fault of their own they may

> fail to impress the jury as honest and reliable witnesses. . . .
>
> Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed.

Id. at 609-10.

As Mr. Cohen made clear in the affidavits he submitted to the court, he relied on the admission of Professor Huber's testimony in deciding to exercise his right not to testify in his own defense. Had he known that Professor Huber's account of what Mr. Cohen said would be stricken, Mr. Cohen stated, he would have taken the witness stand before the defense rested. But when the court suddenly struck Professor Huber's testimony, *sua sponte,* after the close of evidence and completion of all but his counsel's closing argument, it was too late for Mr. Cohen to take the stand. Although unintentionally, the court had lulled Mr. Cohen into believing that he would not need to testify, causing him to relinquish his right to testify.

Moreover, by the time Professor Huber took the stand as a defense witness, the trial court had already eliminated Mr. Cohen's chief defense -- the testimony of his former client, James Smith. Professor Huber's testimony thus was critical to Mr. Cohen. It was offered to show Mr. Cohen's state of mind, specifically that he sought to learn whether he could reveal the confessions of Mangone, Smith, and Vasapolle that he had heard a few days earlier. This evidence could well have led the jury to infer that Mr. Cohen was

surprised and shocked by the revelations of his clients and that he did not knowingly and intentionally participate in their criminal scheme.

In *Wogan v. United States*, 846 F. Supp. 135 (D. Me. 1994), the court highlighted the importance of the defendant deciding whether to testify only after being fully informed on the strategic implications of that decision. The information upon which a defendant makes his decision is crucial, because "a defendant cannot be found to have relinquished a constitutional right unless the waiver is made intelligently, voluntarily, and knowingly." *Id.* at 140, citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Mr. Cohen cannot be said to have waived his right to testify "intelligently, knowingly, and voluntarily" where the court delayed taking action on Professor Huber's testimony until his counsel was ready to argue.

This Court's decision in *Brooks v. Tennessee* emphasizes the need for the defendant and his counsel to have a fair chance in deciding whether the defendant will testify. In striking down a Tennessee rule requiring the defendant to testify before any other defense witnesses, the Court noted that such limitations violate the Due Process Clause because they deprive the accused of "the guiding hand of counsel at every step of the proceedings against him." 406 U.S. at 613, *quoting Powell v. Alabama*, 287 U.S. 45, 69 (1932). The Court observed:

> Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the

> defense — particularly counsel — in the planning of its case.

406 U.S. at 612; *see also United States v. Systems Architects, Inc.*, 757 F.2d 373, 375 (1st Cir.), *cert. denied*, 474 U.S. 847 (1985) ("While the due process clause of the Fifth Amendment may be understood to grant the accused the right to testify, the 'if' and 'when' of whether the accused will testify is primarily a matter of trial strategy between the defendant and the attorney."). While the trial court did not explicitly deny Mr. Cohen his right to testify, its action in waiting until the moment of his counsel's closing argument to strike key evidence had the same effect, and places the appeals court's decision in conflict with *Brooks v. Tennessee*. Accordingly, the petition should be granted.

3. The four-level enhancement for conduct jeopardizing the safety and soundness of a financial institution imposed on Mr. Cohen violates the *ex post facto* clause of the United States Constitution. Guidelines section 2F1.1(b)(6)(A) was made effective on November 1, 1990 by Amendment 317. Because all the loans charged in the indictment and proven at trial (and any relevant conduct) were made before November 1, 1990, the amendment cannot properly be applied to Mr. Cohen. The last loan described in the indictment, for example, was closed on June 20, 1990, some five months before amendment of the guideline.

This Court recently granted certiorari in *United States v. Cooper*, 35 F.3d 1248 (8th Cir. 1994), *vacated, remanded, mot. granted*, 131 L. Ed. 2d 742, 115 S. Ct. 1829 (1995). In *Cooper*, the defendant argued that application of the Sentencing Guidelines, as amended, to a series of three firearm offenses, two that were committed prior to the effective date of the Sentencing Guidelines in question, violated the *ex post facto* clause. The appeals court affirmed

Cooper's sentence, relying in part on case law holding that, in a conspiracy and other continuing offenses, the completion date of the offense controls the version of the Sentencing Guidelines to be applied. *Id.* at 1251.

Mr. Cohen acknowledges that, where the culpable conduct extends beyond the effective date of an increased guideline, it is proper to apply that increased guideline, unless the defendant can show that he withdrew from the conspiracy. *United States v. Arboleda*, 929 F.2d 858, 870-71 (1st Cir. 1991). Mr. Cohen contends that here, because no new loans were taken out after November 1, 1990, the Court may not apply the four level enhancement of § 2F1.1(b)(6)(A). Mr. Cohen's "straddle" case, involving the question whether culpable conduct relating to a loan can extend beyond the date the loan closes is factually more compelling than Cooper and worthy of certiorari.

The fact that the indictment alleged that the conspiracy extended into March 1991, when the NCUA took over Barnstable, is not dispositive. *United States v. Kopshever*, 6 F.3d 1218, 1222 (7th Cir. 1993). The question is whether the facts underlying application of this particular enhancement — taking out loans — occurred after the change in the law. The court in *Kopshever* noted this problem:

> When pressed at oral argument to pinpoint a specific action that occurred during or after November 1991, the government directed us (1) to Kopshever's counterfeiting activity that took place after the critical date and (2) to Kopshever's asserted holding of trust assets after November 1991. As for the first of those assertions, the date of Kopshever's commission of a separate criminal offense is of course irrelevant to the question

> of what Guidelines provisions apply to the fraud charges. As for the second, a malefactor's mere retention of the proceeds of a fraud does not of course equate to the time when the fraud was committed (if that were so, the statute of limitations might never run on a fraud charge). But we leave the entire factual issue of the time of the offense for the district court to examine in the first instance.

6 F.3d at 1222 n.4. That the operative date is when Barnstable made the loans rather than other post-closing actions that the appeals court decision points to, *see* 46 F.3d at 1329, or merely retaining the loan proceeds, is also suggested by *United States v. Kussmaul*, 987 F.2d 345 (6th Cir. 1993). There the applicable guideline was increased as of November 1, 1990. The indictment charged the defendant with knowingly causing two obscene video tapes to be delivered on November 7, 1990. In fact, the defendant had ordered the tapes in April, 1990; the government delivered the tapes in November, 1990. The Court held that the operative date for purposes of applying the guidelines was April, not November, because that was when the defendant acted. Similarly in this case, because Barnstable made the loans that jeopardized its soundness before the November 1, 1990 amendment became effective, the upward adjustment may not be applied without violating the *ex post facto* clause.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted
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July 5, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1326

UNITED STATES,
Appellee,

v.

JAMES K. SMITH,
Defendant, Appellant.

No. 94-1327

UNITED STATES,
Appellee,

v.

ROBERT COHEN,
Defendant, Appellant.

No. 94-1328

UNITED STATES,

Appellee,

v.

AMBROSE DEVANEY,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Selya, Circuit Judge,

Bownes, Senior Circuit Judge,

and Stahl, Circuit Judge.

Charles W. Rankin, with whom Rankin & Sultan, Sheldon Krantz, and Piper & Marbury, were on brief for appellant Robert Cohen; Joseph J. Balliro, with whom Balliro, Mondano & Balliro, P.C., was on brief for appellant James K. Smith; and Emmanual N. Papanickolas, for appellant Ambrose Devaney.

Paul G. Levenson, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, and Victor A. Wild, Assistant United States Attorney, were on brief for appellee.

February 10, 1995

BOWNES, Senior Circuit Judge. After a joint trial, defendants James Smith, Robert Cohen, and Ambrose Devaney were convicted of defrauding two federal credit unions and other related offenses. Although some aspects of the trial give us pause, we affirm the convictions and sentences.

I. FACTS

We review the facts in the light most favorable to the government. United States v. Ford, 22 F.3d 374, 382 (1st Cir.), cert. denied, 115 S. Ct. 257 (1994). Between December 1985 and March 1991, James Smith, Richard Mangone, Robert Cohen, and Ambrose Devaney fraudulently obtained tens of millions of dollars in real estate loans from the Barnstable Community Federal Credit Union (BCCU) and the Digital Employees Federal Credit Union (Digital). Smith, a real estate developer, and Mangone, President of Digital, were co-founders of BCCU. Robert Cohen was general counsel to both credit unions. Smith and Mangone controlled much of BCCU's lending through Lynn Vasapolle, a coconspirator who was BCCU's manager. Devaney was a real estate developer, the only defendant who was an outsider to the credit unions.

The loans were used in part to finance the purchase of commercial real estate on Cape Cod. To circumvent the credit unions' policies restricting "insider" loans or limiting maximum borrowing by an individual, Smith, Mangone, and Devaney formed more than a dozen nominee trusts to create the impression that the loans were going to many different borrowers. Cohen, who served as closing attorney for the credit unions, prepared the trust instruments and closing binders. He also instructed Vasapolle what documents to include in her BCCU files.

The conspirators concealed their interest in the trusts by representing the trustees as putative owners. At Mangone's direction, Vasapolle prepared false certificates of beneficial interest on a blank form that Cohen had provided. There was evidence that in some cases Cohen directly submitted false certificates to BCCU, while maintaining parallel sets of genuine and false certificates in his files. In one case where he served as trustee, Cohen signed a certificate misrepresenting himself and his wife as the beneficiaries of the trust.

For their part, Smith and Vasapolle prepared false financial statements for BCCU showing that the trustees qualified for the loans. Smith altered the purchase and sale agreements, sometimes inflating the purchase price by millions of dollars, in order to obtain larger loans. The excess loan proceeds were usually deposited in Cohen's client account, transferred to one of Smith's accounts, and then distributed to Smith, Mangone, and Devaney.

In the late 1980's, the real estate market on Cape Cod collapsed. Unable to sell the properties and faced with mounting debts, Smith, Mangone, and Devaney resorted to a pyramid scheme. Cohen created new trusts that purported to buy subdivisions from the old trusts; the sham "sales" were in turn financed by new loans from the credit unions. By March 1991, when BCCU was seized by regulators from the National Credit Union Administration (NCUA), the outstanding balance on the Smith-Mangone-Devaney loans had reached forty to sixty million dollars.

On September 12, 1992, Smith, Mangone, Cohen, and Devaney were indicted for conspiracy (18 U.S.C. § 371) to commit bank fraud (18 U.S.C. § 1344); unlawful receipt of monies by a credit union officer (18 U.S.C. § 1006); and unlawful monetary transactions (money laundering)

(18 U.S.C. § 1957). Each defendant was also charged with various offenses underlying the conspiracy. The case was tried on a redacted indictment that included a conspiracy count, seven bank fraud counts, seven parallel unlawful receipt counts (which concerned Mangone alone), and the money laundering charges. Vasapolle testified under a plea agreement and explained the workings of the conspiracy.

Smith and Mangone were convicted on all counts. Cohen was convicted on all counts except for four money laundering counts. Devaney was convicted of conspiracy, three counts of bank fraud and one count of money laundering. Mangone fled before sentencing. Smith was sentenced to fifteen years imprisonment and three years supervised release, and ordered to pay up to twenty million dollars in restitution. Cohen was sentenced to ten years imprisonment. Devaney was sentenced to thirty-seven months imprisonment and three years supervised release, and was ordered to pay up to ten million dollars in restitution.

II. DISCUSSION

These appeals turn largely on whether the defendants should have been severed for separate trials under Fed. R. Crim. P. 14. Cohen also argues that certain evidentiary rulings and jury instructions deprived him of a fair trial. Devaney argues that various counts of the indictment were multiplicitous, and that the evidence was insufficient to support his convictions. Each defendant challenges his sentence on various grounds.

A. Bruton error

We begin with Smith's claim of error under Bruton v. United States, 391 U.S. 123 (1968) -- the heart of his argument for severance. Bruton held that, because of the substantial risk that a jury, despite contrary instructions, will

look to a codefendant's incriminating extrajudicial statement in determining a defendant's guilt, admission of the codefendant's statement in a joint trial violates the defendant's right of cross-examination under the Confrontation Clause of the Sixth Amendment. Id. at 126. As the Court emphasized in Richardson v. Marsh, 481 U.S. 200, 208 (1987), Bruton error occurs where the codefendant's statement "'expressly implicate[s]'" the defendant, leaving no doubt that it would prove "'powerfully incriminating'" (quoting Bruton, 391 U.S. at 124 n.1, 135). There is no Bruton error if the statement becomes incriminating "only when linked with evidence introduced . . . at trial." Richardson, 481 U.S. at 208. See United States v. Limberopoulos, 26 F.3d 245, 253 (1st Cir. 1994) (Bruton protects against the "powerfully incriminating effect of [a nontestifying] accomplice pointing the finger directly at another"; by contrast, "inferential incrimination . . . can be cured by limiting instructions").

Against this backdrop, we turn to the claimed Bruton error. The trial began on May 17, 1993. During the government's case, Vasapolle testified that she, Cohen, Smith, and Mangone met twice after the BCCU takeover to discuss the possibility of removing or destroying loan documents from the BCCU's and Cohen's files. Cohen allegedly agreed to remove some of his documents, but advised his coconspirators that it would be impossible to purge all of the files. He also refused to destroy any documents because to do so would be an obstruction of justice.

On June 28, 1993, the last day of testimony, Cohen called Professor Richard Huber, an authority on professional responsibility. Huber testified subject to a limiting instruction that his testimony "has nothing to do with . . . Mr. Smith [and] Mr. Devaney." According to Huber, Cohen called him

in late March of 1991 and "indicated that he had a serious problem with professional responsibility that was facing him and he would like to have an opportunity to discuss it." Cohen met with Huber on April 4, 1991. Huber testified:

> Mr. Cohen explained that he had been involved as a lawyer for a banking institution . . . . [O]n the 23rd of March [1991], a former officer of the bank, a former director of the bank, and a bank manager came in and spoke to him . . . concerning activities that involved them and their work at the bank.
>
> ***
>
> [E]ssentially it amounted to the issue that certain documents had been changed, the information had been changed, figures had been changed, data had been changed, that this had been done after preparation by Mr. Cohen and after they had been presumptively completed, as far as he was concerned, and were in file -- in his files, the bank files. He indicated that it was a possibility, though he wasn't certain, as I can recall this, that there may have been also forgeries, in terms of signatures including possibly his own.
>
> But the main thrust . . . was that documentation which he had prepared and which was complete and on file, had been changed by these three people in their indication to him when they met with him.

Cohen asked "whether he could reveal any of this information, which had been received from these persons as clients." Huber advised him that "there was no way in which

he could reveal confidences at that point in time," but that he could do so "if it was necessary to protect himself, that is, where he would be charged with crime or where he would be sued civilly."

After Huber testified, Cohen's codefendants moved for a mistrial, citing Bruton. The court deferred its ruling until Cohen's next witness had testified. Just before Cohen's closing argument, the court instructed counsel "[not to] argue what Cohen said to Huber," because that evidence would be stricken. The court then stated, "[Y]ou may argue what Huber said to Cohen." The next day, the court instructed the jury that Huber's testimony of what Cohen "said to him about other persons [is] . . . stricken entirely." Left in evidence was "the fact that Mr. Cohen went to Huber, the fact that he made disclosures to Mr. Huber . . . and the testimony of Mr. Huber about what he said to Mr. Cohen . . . ." As it explained at sidebar, the court submitted the case to the jury because the Bruton error (if any) occurred during the last day of testimony in a lengthy trial, and might be mooted by an acquittal. In addition, the harmfulness of the error would be more apparent in light of the verdicts.

All of the defendants were convicted, and Smith moved for a new trial. The district court opined that there had been an "egregious error" under Bruton. In the court's view, however, the Bruton evidence was "merely cumulative" of the government's case and therefore harmless beyond a reasonable doubt.

In the classic Bruton scenario, Cohen would have made a detailed confession of bank fraud, naming Smith as an accomplice. The government could not introduce such an incriminating statement at a joint trial, even against Cohen alone. In fact, Cohen -- not the government -- offered his own statement that three unnamed clients came to him and

essentially confessed to bank fraud. The government emphasizes the self-serving nature of this evidence, while Smith dwells on the power of a confession offered to one's own attorney at a time of presumed confidence. To us, these factors seem more or less a wash. We shall assume without deciding that the district court correctly found that Bruton error had occurred.[1/] Cohen's statement could be found to be "powerfully incriminat[ing]" on its face, even without "inferential incrimination" from other evidence in the case. Richardson, 481 U.S. at 208.

We are nonetheless convinced that any error was harmless beyond a reasonable doubt. See Harrington v. California, 395 U.S. 250 (1969) (Bruton errors are subject to harmless-error analysis under Chapman v. California, 386 U.S. 18 (1967)). The jury convicted all the defendants on the conspiracy count, and Cohen on most of the substantive counts. Even if the jury threw the curative instructions to the wind[2/] and considered the stricken testimony as evidence

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[1/]The government asks us to hold that the Bruton statement must actually name the defendant. We regard this as an open question that we need not answer at this time. See Richardson, 481 U.S. at 211 n.5 ("We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun."); United States v. Cleveland, 590 F.2d 24, 28 n.4 (1st Cir. 1978) ("A Bruton problem is, of course, not necessarily avoided merely by deleting names."). Cf. United States v. Limberopoulos, 26 F.3d 245, 253 (1st Cir. 1994) (codefendant's statements "neither name nor impugn [defendant] directly") (emphasis added). But see United States v. DiGregorio, 605 F.2d 1184, 1190 (1st Cir.) ("where the confession does not name a codefendant, it may be admitted under Cleveland solely against the confessor"), cert. denied, 444 U.S. 937 (1979).

[2/]We recognize, of course, the strong presumption that jurors will follow the trial court's limiting instructions. See, e.g., United States v. (continued...)

against Smith, the scenario which implicates Bruton, it could not have believed Cohen's claim that the unnamed clients confessed to him at the close of the conspiracy. No one confesses to a partner in crime. Cf. DiGregorio, 605 F.2d at 1190 (finding any error in admitting codefendant's statement harmless; noting that the defendant was acquitted of the substantive act of participating in the shooting).

Admittedly, Cohen's statement might tend to incriminate Smith and Devaney by showing that the co-conspirators met to discuss damage control. In this sense, however, the statement falls far outside the pale of the "powerfully incriminating" evidence that produces Bruton errors. Vasapolle had already testified in detail to the coconspirators' meetings in the wake of the BCCU takeover. Thus, once Cohen's statement is considered as something other than an account of the codefendants' confessions, it becomes merely cumulative of the government's case and could not have produced Bruton error. See DiGregorio, 605 F.2d at 1190 (fact that a codefendant's admission tended to corroborate government's case against the defendant is insufficient, standing alone, to trigger Bruton); United States v. Rawwad, 807 F.2d 294, 296 (1st Cir. 1986) ("[t]he mere fact of corroboration is not enough to warrant finding a Bruton violation"), cert. denied, 482 U.S. 909 (1987).

The right of confrontation ensures that a criminal defendant can cross-examine his or her accusers. Had Cohen testified to the confession himself, Smith's cross-examination of Cohen would have sought to show that no confession ever occurred. The verdicts suggest that the jury, if it considered

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[2/](...continued)

Sepulveda, 15 F.3d 1161, 1185 (1st Cir. 1993), cert. denied, 114 S. Ct. 2714 (1994).

this evidence, found just that. The jury, even if it disregarded the limiting instructions, plainly did not believe Cohen's claim that his codefendants had confessed to him. It is clear, therefore, that any Bruton error was harmless beyond a reasonable doubt.

B. Severance

We now consider whether the district court should have granted a severance based on the alleged prejudice created by a joint trial. "[A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. United States, 113 S. Ct. 933, 938 (1993). The denial of a motion for severance "'will be overturned only if [the district court's] wide discretion is plainly abused,'" United States v. O'Bryant, 998 F.2d 21, 25 (1st Cir. 1993) (quoting United States v. Natanel, 938 F.2d 302, 308 (1st Cir. 1991), cert. denied, 112 S. Ct. 986 (1992)), "'depriv[ing] defendant of a fair trial [and] resulting in a miscarriage of justice.'" United States v. Tejeda, 974 F.2d 210, 219 (1st Cir. 1992) (quoting United States v. McLaughlin, 957 F.2d 12, 18 (1st Cir. 1992)).

1. Antagonistic defenses

Smith and Devaney argue that their defenses were antagonistic to Cohen's. In his opening statement, counsel for Cohen characterized his client as an innocent third party, forced by the government to play the role of an assistant prosecutor. "Mr. Cohen's theory of defense is if this [the bank fraud] happened, then he was not part of it." (Emphasis added.) Counsel also stated that the codefendants had falsified loan documents; that Smith asked Cohen to destroy certain files; and that Cohen, stunned by these revelations,

sought the advice of a law professor regarding his professional responsibility.

Opening statements, of course, are not evidence. The true level of antagonism between the defenses is measured by the evidence actually introduced at trial. See United States v. Torres-Maldonado, 14 F.3d 95, 104-05 (1st Cir.), cert. denied, 115 S. Ct. 193 (1994). Moreover, "mere antagonism of defenses does not require severance." United States v. Yefsky, 994 F.2d 885, 896 (1st Cir. 1993). See United States v. Angiulo, 897 F.2d 1169, 1195 (1st Cir.) (collecting cases in which we have denied severance despite "sharply antagonistic defense theories"), cert. denied, 498 U.S. 845 (1990). "[T]he tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." Yefsky, 994 F.2d at 897 (citing United States v. Arruda, 715 F.2d 671, 679 (1st Cir. 1983)).

We recognize that this is not a case of mere tattling or "finger-pointing" between defendants. Cohen offered testimony suggesting that Smith (among other codefendants) had actually confessed to him. For several reasons, however, Smith has not made the "strong showing of prejudice," McLaughlin, 957 F.2d at 18, required to obtain a severance.

We emphasize that the key testimony antagonistic to Smith -- what Cohen allegedly told Huber -- is not part of this case. That testimony was originally admitted only in Cohen's case, and only for the fact that Cohen had made certain assertions to Huber -- not for the truth of those assertions. We have found the testimony harmless, even if it may have been wrongly admitted initially. See supra, section II.A. Finally, the district court struck the testimony altogether. Assuming that some prejudice remained for purposes of severance, see Zafiro, 113 S. Ct. at 938 (Bruton-related problems "might present a risk of prejudice")

(emphasis added), Rule 14 "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Id.

As our Bruton discussion shows, the jury demonstrated by its verdicts that it did not believe Cohen's "confession" defense, assuming that it improperly considered it at all. Cf. Zafiro, 113 S. Ct. at 939 (finding convictions supported by the evidence and rejecting claim that the jury found at least one of the defendants guilty without regard to whether the government proved its case beyond a reasonable doubt) and 940 (Stevens, J., concurring) ("in any event, the jury in this case obviously did not believe Soto and Zafiro, as it convicted both of them. Accordingly, there is no basis . . . for concluding that the the[ir] testimony . . . prejudiced their codefendants.").

Moreover, if the jury in fact followed the limiting instructions, there was simply no significant evidence that was antagonistic to Smith. It in no way appears that the jury "unjustifiably infer[red]" -- from the alleged antagonism alone -- that both Smith and Cohen were guilty. United States v. Talavera, 668 F.2d 625, 630 (1st Cir.), cert. denied, 456 U.S. 978 (1982).

In sum, Smith, the only appellant arguably incriminated by Huber's testimony about what Cohen said to him, failed to demonstrate strong prejudice from the joint trial on the basis of Bruton and the antagonistic defenses. His and Devaney's parallel arguments for severance must therefore be rejected.

2. Codefendant testimony

Cohen argues that the joint trial deprived him of Smith's exculpatory testimony. In support of Cohen's pretrial

motion for severance, Smith furnished two affidavits representing that, if he were tried first, he would testify on Cohen's behalf at a later trial.

To obtain a severance on the basis of a codefendant's testimony, the defendant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. United States v. Drougas, 748 F.2d 8, 19 (1st Cir. 1984). We shall refer to these as the "first-tier" Drougas factors. Upon such a showing, the district court should (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) consider whether the testimony would be subject to substantial, damaging impeachment; (3) assess the counter arguments of judicial economy; and (4) give weight to the timeliness of the motion. Id. These are "second-tier" Drougas factors.

The district court found that Cohen had satisfied the first tier of criteria under Drougas.[3/] It denied the motion

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[3/]If the offer to testify is conditioned on the order of the separate trials, there is an open question whether the codefendant's availability meets Drougas' first-tier requirements. We note, however, that several of our sister circuits have ruled that an offer to testify, conditioned on one defendant being tried before the other, fails to satisfy the elements of a prima facie case for severance. See, e.g., United States v. Washington, 969 F.2d 1073, 1080 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1287 (1993); United States v. Blanco, 844 F.2d 344, 352-53 (6th Cir.), cert. denied, 486 U.S. 1046 (1988); United States v. Haro-Espinosa, 619 F.2d 789, 793 (9th Cir. 1979); United States v. Becker, 585 F.2d 703, 706 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979). Here, the district court found that Cohen had satisfied this requirement, notwithstanding Smith's conditional proffer. Because the court correctly denied severance on the basis of second-tier Drougas factors, see infra, we need not consider whether such a conditional proffer necessarily fails the Drougas test.

for severance, however, because Smith's proffered testimony was "more circumstantially than directly" exculpatory. The court also weighed two other factors -- concerns for judicial economy in a lengthy conspiracy trial, and the fact that Cohen himself could testify to some of the issues raised by Smith. It decided that these factors militated against severance.

The district court relied primarily upon factors specifically authorized by Drougas. Judicial economy is obviously not dispositive, but it is important in a lengthy conspiracy trial. Most tellingly, the district court found that under the second tier of Drougas factors, Smith's artfully-worded affidavits were not significant when considered in relation to Cohen's theory of defense. Smith averred that there was "no agreement . . . wherein Cohen agreed to provide documentation" to the credit unions "that he knew was prepared in such a way so as to conceal . . . the true recipients" of the loans. This adds little to Cohen's plea of not guilty. To be "significan[t] in relation to the defendant's theory of defense," Drougas, 748 F.2d at 19, the codefendant's proffer has to do more than assert ultimate facts. Cf. United States v. Ford, 870 F.2d 729, 732 (D.C. Cir. 1989) (conclusory statements did not meet burden of establishing the exculpatory "nature and effect" of the codefendant's testimony). It should furnish facts that could significantly advance the theory of defense. With its first-hand exposure to the case, the trial court is in the best position to make this assessment. See O'Bryant, 998 F.2d at 25.

Cohen argues that it was an abuse of discretion for the district court to consider his ability to testify to the issues raised by the Smith affidavits. First, his own testimony would necessarily seem self-serving; second, a defendant's right not to testify might be infringed if his ability to testify

is given significant weight by a court performing a Drougas analysis. We assume that the defendant's ability to testify is an improper factor under Drougas. The district court, however, was primarily dissatisfied with Smith's proffer. See infra. Because severance could have been denied on that basis alone, we do not think the court accorded "significant weight" to an improper factor. United States v. Gallo, 20 F.3d 7, 14 (1st Cir. 1994) (quoting United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992)).

Smith's affidavits were admittedly not without exculpatory value. The second affidavit stated that "Robert Cohen sent closing packages to Lynn Vasapolle . . . which included copies of the Certificate of Beneficial Interest in which the names of some of the co-defendants were included" (emphasis added). Vasapolle allegedly informed Cohen in or about 1989 that BCCU would no longer require such certificates to be included in the closing packages. Finally, Smith averred that "despite the instructions from Cohen[,] Vasapolle would alter and remove files from BCCU." As the following colloquy shows, however, even the most promising portions of Smith's affidavits offer less than meets the eye:

> Court: I understand that that's a significant part of [Cohen's] defense.
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> Counsel: Yes, it is, your Honor.
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> Court: That the closing packages were all sent in an appropriate form.
>
> Counsel: Exactly.
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> Court: And after they left Mr. Cohen's hands, this witness and other conspirators altered them. I have been looking in these affidavits for support for that proposition. And while there is some circumstantial evidence that is

> consistent with that proposition, nowhere does Mr. Smith say that. Paragraph 3 [of the second affidavit] doesn't say it, especially if we're talking [about] the period once the investigation [of BCCU] started.

(Emphasis added.)

We think that the district court's on-the-spot assessment of severability was beyond reproach. We recognize that there were "very real arguments" in favor of severance, such that in the exercise of its discretion, the court could have ordered separate trials. The very closeness of the question, however, convinces us that there was no abuse of discretion.

Finally, Devaney argues that severance should have been granted because he wished to call Cohen as a witness to show that he relied in good faith upon the advice of counsel. This argument was not made to the district court and, therefore, has been waived. United States v. Zannino, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990). We note that Devaney's initial motion for severance argued that Cohen's anticipated testimony would be antagonistic, not exculpatory.

C. Reputation evidence

Cohen challenges the district court's ruling that he could not elicit evidence of his reputation for truthfulness and veracity until he had taken the stand. Irene Petri, a paralegal and secretary for Cohen's law firm, was called as a witness by both the government and Cohen. Cross-examining Petri during the government's case, counsel for Cohen asked whether she had formed an opinion about Cohen's reputation for truthfulness and veracity. The district court sustained the

government's objection and instructed counsel to "[m]ove on." At sidebar, the court explained:

> Mr. Zalkind, first, I don't take kindly to your trying to get reputation evidence from this witness before your fellow's testified. His reputation's not at issue here, he has to take the stand before his reputation for truth and veracity is at issue.

Cohen never took the stand. He made no attempt to revisit the issue when he called Petri as a defense witness, and he called none of the character witnesses on his trial list. In fact, he failed to raise the issue in several post-trial motions for new trial and acquittal. Seven months after the trial and on the eve of sentencing, Cohen moved for release pending appeal and raised the issue for the first time.

The government concedes that even if a criminal defendant does not testify, evidence of his truthfulness and veracity may be admitted where such character traits are "pertinent" to the case. See Fed. R. Evid. 404(a)(1); United States v. Lilly, 983 F.2d 300, 306 (1st Cir. 1992). But the erroneous ruling did not, as Cohen claims, "place[] an entire facet of the defense off-limits." Even before the government rested, the court openly questioned its prior ruling that Cohen should take the stand before recalling Petri to testify to statements he had made in her presence. "Suppose Mr. Cohen doesn't testify . . . . I'm hesitant to condition things on his testifying. He has an absolute right not to testify." True, the district court did not refer specifically to reputation testimony; but under these circumstances, the challenged ruling must be considered provisional, not final.

In its order denying Cohen's motion for release pending appeal, the district court found the erroneous ruling harmless in light of "the ability of defense counsel to return

to the issue and proffer such evidence afresh." We agree with this assessment. Counsel should have attempted to offer reputation evidence, either through Petri, whom he recalled, or the other character witnesses. Cf. United States v. Holmquist, 36 F.3d 154, 162-66 (1st Cir. 1994) (exclusion of evidence pursuant to a provisional in limine pretrial order may be challenged on appeal only if the party unsuccessfully attempted to offer such evidence in accordance with the terms specified in the order); Earle v. Benoit, 850 F.2d 836, 847 (1st Cir. 1988) (preliminary ruling such as a ruling in limine does not excuse failure to make an offer of proof). In short, Cohen abandoned the issue at trial.

D. The striking of Huber's direct testimony

As counsel for Cohen was about to make his closing argument, the district court made the following ruling: "[T]hose things which Huber testified that Cohen said to him . . . I'm striking that out so don't argue what Cohen said to Huber. You may argue what Huber said to Cohen." Cohen claims that he would have taken the stand had he known that his statements to Huber would be stricken; the ruling thus deprived him of his right to testify in his own defense.

We are not persuaded. The striking of Huber's testimony may have upset his trial strategy, but it did not render Cohen less able to testify. Cohen never moved to reopen the evidence so that he could take the stand. Under these circumstances, we see no deprivation of the right to testify in one's own defense.

Before the conclusion of closing arguments, Cohen filed an affidavit stating that he "would have chosen to testify" had he known that his testimony was necessary for the admission of Huber's entire testimony. In his reply brief, Cohen argues that his affidavit was the "functional equivalent" of a motion to reopen evidence, assuming such a

motion was required, and that the district court should have inquired whether Cohen wished to testify. Nothing in the affidavit or in counsel's arguments to the district court, however, suggested that Cohen still wished to take the stand.

Cohen also argues that the stricken portion of Huber's testimony was admissible for the fact that it was made and for his state of mind, not for the truth of anything asserted. Any error in this evidentiary ruling was harmless. The jury was instructed that it could consider "the fact that Mr. Cohen went to Huber, the fact that he made disclosures to Mr. Huber . . . and the testimony of Mr. Huber about what he said to Mr. Cohen . . . ." The jury had heard from Vasapolle that the codefendants made several disclosures during their post-takeover meeting that apparently took Cohen by surprise. In light of Huber's admitted testimony that Cohen could not yet "reveal . . . this information, which had been received from these three persons as clients," the jury could have reconstructed the apparent purpose of Cohen's consultation. There was an adequate evidentiary basis for the jury to infer Cohen's then-existing state of mind, even assuming that the stricken part of Huber's testimony was admissible for that purpose. Indeed, counsel for Cohen argued this point in his closing as if the stricken testimony were still in evidence:

> This is a case of a lawyer who has now heard his clients admitting to crimes. What does he do next? What's his state of mind? . . . .
>
> [H]e then went to the . . . professor. And after having this long conversation with him, the professor told him you cannot disclose this information until such a time comes when maybe you may have to.

The court's ruling striking the testimony of what Cohen said to Huber may not have come at an ideal time; but Huber's testimony seemed to catch everyone -- even counsel for Cohen -- by surprise.[4] We conclude that the court's effort to control the fallout from its Bruton ruling did not unduly prejudice Cohen's right to present his defense.

E. Multiplicity of charges

Devaney argues that the indictment was multiplicitous in various ways. His first claim, that Count 1 (conspiracy) was multiplicitous with all of the substantive counts, ignores the principle that "conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act." Iannelli v. United States, 420 U.S. 770, 777 (1975).

We think the other claims of multiplicity are similarly unfounded. The bank fraud counts (Counts 2-6) were not multiplicitous with each other, even though they relate to a single scheme to defraud, because separate trusts, trustees, properties, and sums of money were involved. Each loan transaction was a separate execution of the fraudulent scheme. United States v. Brandon, 17 F.3d 409, 421 n.8 (1st Cir.), cert. denied, 115 S. Ct. 80 (1994).

The money laundering counts were not multiplicitous with the bank fraud counts. Bank fraud and money laundering do not constitute a single offense within the meaning of the test of Blockburger v. United States, 284 U.S. 299 (1932). Money laundering (technically, an unlawful

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[4]Counsel for Cohen: "Frankly, I never prepared the professor. I just said let's have your best memory. I saw him out here for about ten minutes and that was it. What he remembered was, quite frankly, pretty astonishing to me, he has an excellent memory."

"monetary transaction") is defined as knowingly engaging "in a monetary transaction in criminally derived property . . . ." 18 U.S.C. § 1957. There is no requirement that the defendant must have committed the crime (here, the bank fraud) from which the property was "derived." In fact, Congress "intended money laundering to be a separate crime distinct from the underlying offense that generated the money." United States v. LeBlanc, 24 F.3d 340, 346 (1st Cir.), cert. denied, 115 S. Ct. 250 (1994).

Finally, the four money laundering counts were not multiplicitous of each other merely because they flow from a single transaction that took place in a single day. The time period is of no moment. Each count charges a discrete "transfer . . . of funds" to a distinct payee "by, through, or to a financial institution" within the meaning of the statute. 18 U.S.C. § 1957(f)(1).

F. The sufficiency of evidence

Devaney argues that the district court in effect acquitted him on Count 1 (conspiracy) when it made an evidentiary finding under Fed. R. Evid. 801(d)(2)(E) and United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977), that certain alleged coconspirator statements were not admissible against Devaney because the court did not "find by a fair preponderance of the evidence that Mr. Devaney is a co-conspirator in the overarching or big or continuing conspiracy . . . ." Petrozziello rulings are not findings on whether the evidence is sufficient for a count to go to the jury. See United States v. Pitocchelli, 830 F.2d 401, 403 (1st Cir. 1987) (district court properly excluded coconspirator's hearsay statements while refraining from disturbing jury finding of conspiracy). The district court plainly held that

there was sufficient evidence for the conspiracy charge against Devaney to go to the jury.[5/]

Devaney argues that there was insufficient evidence to support his conviction on Count 1 (conspiracy), Counts 5-7 (bank fraud), and Count 19 (money laundering). In making this argument, he bears "the heavy burden of demonstrating that no reasonable jury could have found [him] guilty beyond a reasonable doubt." United States v. Innamorati, 996 F.2d 456, 469 (1st Cir.), cert. denied, 114 S. Ct. 409 (1993). We review the evidence in the light most favorable to the government, "drawing all plausible inferences in its favor and resolving all credibility determinations in line with the jury's verdict." Id.

1. The overarching conspiracy

The evidence against Devaney tended to show the following. Devaney owned a one-third interest along with Smith and Mangone in eleven of the trusts that had received "participation" loans.[6/] He also owned a one-third interest in some of the trusts that were involved in sham "rollover" sales. In all, Devaney received nearly one million dollars in excess proceeds from the fraudulent loans.

Devaney, the only outsider to the credit unions, was valuable to the conspiracy precisely because he was an

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[5/]Because Devaney was never, as he claims, "functional[ly] . . . acquitt[ed]" of the conspiracy count, we need not address his claims of double jeopardy and collateral estoppel, or his contention that the Petrozziello ruling compelled a directed verdict of acquittal on the substantive counts of bank fraud.

[6/]Participation loans were loans administered by BCCU and largely funded by Digital, the "participating" institution. These loans ranged from $1,200,000 to over $4,000,000.

outsider. Devaney's role in the conspiracy can be summarized as follows: he (1) identified the target properties and negotiated for their purchase by Mangone, Smith, and himself; (2) falsely represented that he and his wife were the sole owners of trusts that were jointly owned by Smith and Mangone; (3) signed purchase and sale agreements with inflated purchase prices that were submitted to BCCU; (4) recruited putative borrowers, and signed indemnification agreements assuring them that they would not be liable for loans; (5) concealed from Digital's loan officer the fact that Mangone, president of Digital, was a beneficiary of one of the trusts; and (6) signed a purchase and sale agreement as the purported buyer in a rollover sale from one trust to another. From this evidence, the jury reasonably found that Devaney provided the "front" for the grand conspiracy.

2. Bank fraud

In light of the district court's Petrozziello finding, Devaney argues that certain (unspecified) statements and acts of his alleged coconspirators should have been excluded from the case against him, leaving insufficient evidence to support his conviction of bank fraud. This argument is made in so perfunctory a manner that it must be deemed abandoned. Zannino, 895 F.2d at 17. Devaney makes no effort to isolate any evidence erroneously admitted against him, or to show that the district court's limiting instructions were somehow inadequate.

Devaney argues that he made no material misrepresentation under 18 U.S.C. § 1344(2) because neither credit union had a written policy requiring the disclosure of

trust beneficiaries.[7/] We agree that § 1344(2) requires a material misrepresentation. See, e.g., United States v. Davis, 989 F.2d 244, 247 (7th Cir. 1993); United States v. Sayan, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992). Devaney nonetheless misses the forest for the trees. It is inconceivable that the inflated loans would have been issued had the credit unions known, not only the identity of the true owners of the trusts (the only misrepresentation Devaney addresses), but also the true purchase price of the properties, and the fact that one of the loans for which Devaney was convicted was used to finance a sham "rollover" sale between two of his trusts. There was sufficient evidence to show that Devaney "made false statements or misrepresentations to obtain money" from the credit unions. Brandon, 17 F.3d at 424 (explaining 18 U.S.C. § 1344(2)).

3. Money laundering

Devaney argues that the evidence did not show that he knowingly engaged in a monetary transaction involving criminally derived funds, i.e., the proceeds from the fraudulent loan to the Curtis Village Realty Trust II. He claims that the loan proceeds at issue came from an earlier,

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[7/]18 U.S.C. § 1344 provides: "Whoever knowingly executes, or attempts to execute, a scheme or artifice --

(1) to defraud a financial institution; or

(2) to obtain . . . moneys . . . [from] a financial institution, by means of false or fraudulent pretenses, representations, or promises; [shall be guilty of an offense against the United States]." Although we have held that § 1344(1) does not require a material misrepresentation, United States v. Fontana, 948 F.2d 796, 802 (1st Cir. 1991), the district court did not so instruct the jury, and we do not rely upon § 1344(1) here.

legitimate loan to the Curtis Village trust -- not from the fraudulent BCCU loan.

We have already upheld Devaney's conviction on the parallel count of bank fraud, see supra, and we now reject Devaney's argument of mistaken identity. The government's financial auditor traced the proceeds from the BCCU loan to a $100,000 check payable to Devaney. Thus, the jury reasonably found that Devaney had received funds that were "criminally derived." 18 U.S.C. § 1957(a). The jury also reasonably inferred that Devaney "knowingly" received his share of the fraudulent loan. Id.

G. Waiver of motion for mistrial

Devaney asserts that he was denied due process because the district court held two conferences on his motion for mistrial in his absence and accepted his waiver of possible mistrial despite telltale signs that the waiver was not intelligent, voluntary, and knowing.

As a threshold matter, we doubt that the Due Process Clause prohibits counsel from waiving a pending motion for mistrial on behalf of an absent defendant. Devaney waived, not a mistrial ruling in hand, but one in the bush. Moreover, the record does not show whether Devaney was in fact absent from the courtroom when counsel entered the waiver, or whether he made an informed decision after full consultation with counsel. Devaney's extra-record allegations are more properly made to the district court as part of a claim of ineffective assistance of counsel. We see no due process violation in the district court's acceptance of the waiver.

H. Ineffective assistance of counsel

Lacking a sufficiently developed record with respect to the waiver of mistrial, as well as trial counsel's alleged conflict of interest, we think that Devaney's claim of ineffective assistance should first be raised in the district court. See United States v. Daniels, 3 F.3d 25, 26-27 (1st Cir. 1993).

I. Jury instructions

Cohen challenges the jury instructions on various grounds.

1. Duty to disclose

Cohen argues that the district court erred in instructing the jury that "failure to disclose a material fact may . . . constitute a false or fraudulent misrepresentation" under 18 U.S.C. § 1344 if the defendant was under "a general professional or specific contractual duty to make the disclosure," knew that the disclosure had to be made, and failed to make the disclosure with the specific intent to defraud.

In United States v. Cassiere, 4 F.3d 1006, 1022-23 (1st Cir. 1993), we approved a virtually identical instruction regarding duty to disclose. Cohen argues that the instruction was erroneous in this case because there was no evidence regarding an attorney's duty of disclosure, and because the jury may have confused Cohen's efforts to protect the confidence of his clients with acts of fraudulent misrepresentation.

These objections, which are unique to Cohen's defense, were not preserved below. We therefore review the instruction only for plain error. See Fed. R. Crim. P. 30 (grounds for objection to charge must be stated distinctly);

United States v. O'Connor, 28 F.3d 218, 220-21 (1st Cir. 1994).

The instruction regarding duty to disclose was not plainly erroneous, if it was erroneous at all. Cohen surmises that the jury "punished" him for withholding privileged client information from federal regulators. A more plausible explanation of the verdict, one that does not presume jury confusion, is that Cohen was convicted on the evidence of his affirmative misrepresentations.

2. Fraudulent intent

In United States v. Gens, 493 F.2d 216, 222 (1st Cir. 1974), which involved willful misapplication of funds by a bank officer under 18 U.S.C. § 656, we held that "where the named debtor is both financially capable and fully understands that it is his responsibility to repay, a loan to him cannot -- absent other circumstances -- properly be characterized as [illegal], even if bank officials know he will turn over the proceeds to a third party" (emphasis added). Invoking Gens in the bank fraud context, Cohen argues that the district court erred in not giving a proposed instruction that would have required proof that --

> the trustee who made the representation and who signed individually as the borrower or guarantor on the loan did not believe that the credit union could look to him for payment of any deficiency on the loan, and the particular defendant you are considering was responsible for giving the trustee that belief.

The trustee's belief, and the defendant's assurances of non-liability, would certainly constitute evidence of bank fraud; such evidence, however, is not an element of the offense. See United States v. Brennan, 994 F.2d 918, 924 n.14 (1st

Cir. 1993) (explaining Gens; absence of evidence of assurances to the named debtor would not mandate reversal under misapplication statute). The district court did not err in refusing to give the requested instruction. Moreover, "other circumstances," including the dual sets of certificates of beneficial interest found in Cohen's files, support the jury finding of fraudulent intent. Gens, 493 F.2d at 222.

3. Willful blindness

Cohen argues that the district court should have corrected the prosecutor's closing argument regarding his willful blindness. During the March 23, 1991 meeting at Cohen's office, Vasapolle asked how she could explain the fake trustee financial statements in BCCU's files. Cohen, who was unaware of these statements, became upset and said, "I don't think I want to hear this." Cohen then "got up and left and took a walk." In his closing, the prosecutor argued that Cohen's conduct illustrated his willful blindness. Cohen made an objection, but only after the prosecutor had moved on to a more general illustration.

Even if the objection was preserved, we see no error in permitting the argument of willful blindness. Vasapolle testified that during the same meeting, Cohen explained that "the only thing he [Cohen] could do" to protect the conspirators "would be to take the certificate of beneficial interests out of the file . . . . And he did agree to take them out." The jury could have inferred from this evidence that Cohen pledged to do his part to conceal the conspiracy, and then deliberately walked out to avoid hearing the plans of his coconspirators.

4. Trust provisions

The district court instructed the jury that under Massachusetts law, there is nothing inherently wrong or improper about using nominee trusts to buy and sell real estate:

> A trust is a legal instrument. Its terms are intended to govern the conduct of the participants. To violate these terms isn't a crime. Civil liability may attach, but it's not a crime. But you may consider any evidence of violating or ignoring the terms of a trust as bearing on the intent of the person you're considering with respect to the crimes charged.

Cohen argues that the district court erred by refusing to instruct the jury that "a written contract could be changed any time by the parties orally." The district court also rejected a requested instruction that "oral changes in [trust] membership are permissible."

We see no error in this decision. Even assuming that beneficial interests in a real estate nominee trust can be orally conveyed, the district court's instruction is not contrary: a legitimate oral modification of a trust is not evidence that the defendants "violat[ed] or ignor[ed] the terms of a trust." At any rate, there was no evidence of any oral modification, and the district court was not required to give a proposed instruction merely because it would have been more favorable to the defendant.

5. Reasonable doubt and presumption of innocence

Invoking the Supreme Court's recent decision in Victor v. Nebraska, 114 S. Ct. 1239 (1994), Cohen argues that the district court should have explained the concept of reasonable doubt to the jury. Victor is consistent with our

holding in United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988), that district courts need not define the concept of reasonable doubt so long as the phrase is not buried as an aside. See United States v. Neal, 36 F.3d 1190, 1202-04 (1st Cir. 1994) (reviewing recent Supreme Court decisions). The Constitution "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Victor, 114 S. Ct. at 1243 (citations omitted).

Cohen also argues that the district court erred by refusing to reinstruct the jury on the presumption of innocence at the end of the case. Although the closing instruction on presumed innocence could have been more explicit, the totality of the instructions assures us that the jury did not "retire[] to deliberate less than fully aware of the presumption of innocence." United States v. Van Helden, 920 F.2d 99, 102 (1st Cir. 1990) (quoting United States v. Ruppel, 666 F.2d 261, 274-75 (5th Cir.), cert. denied, 458 U.S. 1107 (1982)). The district court repeatedly stated that the government bore the burden of proving its case beyond a reasonable doubt; gave a forceful opening instruction on the presumption of innocence; reminded the jury at the end of the case that each of the defendants "started the trial presumed innocent"; and admonished the jury that to treat the indictment as evidence against the accused would be to "violate your oath as jurors."

J. Cumulative error

Cohen argues that the cumulative impact of his assigned errors requires reversal, even if the individual errors do not. Because we have found no abuse of discretion in the denial of Cohen's motion for severance, and harmless error, if error at all, only in the striking of Huber's direct testimony, the argument of cumulative error fails. See Brandon, 17 F.3d

at 456 (rejecting similar argument where review of trial proceedings as a whole revealed no "pervasive unfairness or any error or combination of errors that deprived defendants of due process").

K. Sentences

1. Aggravating role

Cohen argues that the district court clearly erred in finding that he was a supervisor or manager of extensive criminal activity. See U.S.S.G. § 3B1.1(b). In United States v. Ovalle-Marquez, 36 F.3d 212, 225 (1st Cir. 1994), cert. denied, 1995 WL 21668, we noted that a defendant "is a manager or supervisor where he 'exercised some degree of control over others involved in the commission of the crime or he [was] responsible for organizing others for the purpose of carrying out the crime'" (quoting United States v. Fuller, 897 F.2d 1217, 1220 (1st Cir. 1990)). To warrant the three-level adjustment under § 3B1.1(b), "the defendant . . . must have 'organize[d] at least one [other] criminally responsible individual.'" United States v. Dietz, 950 F.2d 50, 53 (1st Cir. 1991) (dictum) (quoting United States v. DeCicco, 899 F.2d 1531, 1537 (7th Cir. 1990) (internal citation omitted)).

The district court found that Cohen had "organized" Vasapolle. Vasapolle testified that Cohen instructed her regarding the mechanics of the participation loans -- for example, what documents to include in the BCCU files, and what checks to issue following a closing. These acts, which Cohen calls "ministerial," were not illegal per se, but they were performed under Cohen's instruction by someone who was unquestionably a knowing participant in the crime. Bank fraud by nature rests upon ministerial acts. The district court's finding that Cohen "organized" Vasapolle was not clearly erroneous.

We feel compelled to make one clarification. The prosecutor seriously distorted the record during the sentencing hearing when he suggested that Cohen told Vasapolle to "get [the blank certificates of beneficial interest] signed." Vasapolle testified that she was instructed by Mangone to obtain a short form certificate of beneficial interest from Cohen. Mangone -- not Cohen -- asked her to fill out the certificates with the names of the trustees and their spouses. Before the prosecutor made his misrepresentation, however, the district court had already found Cohen to be a manager or supervisor. The court also properly rejected the government's recommendation of a four-level adjustment for an "organizer or leader," based on evidence that Mangone had the greater control over Vasapolle.

2. Ex post facto clause

Cohen argues that the district court violated the ex post facto clause of the Constitution by imposing a four-level enhancement under U.S.S.G. § 2F1.1(b)(6)(A) for conduct jeopardizing the safety and soundness of a financial institution. "Barring any ex post facto problem, a defendant is to be punished according to the guidelines in effect at the time of sentencing." United States v. Harotunian, 920 F.2d 1040, 1041-42 (1st Cir. 1990).

Section 2F1.1(b)(6)(A) took effect on November 1, 1990, after all of the loans described in the indictment had closed. The conspiracy to defraud charged in Count 1, however, allegedly extended into March 1991; and the district court found that Cohen's "criminal conduct" -- meaning the charged conduct of which he was convicted -- "continued well after the enactment of these guidelines." See United States v. Bennett, 37 F.3d 687, 699 (1st Cir. 1994) (distinguishing charged conduct from relevant conduct for ex post facto purposes). There was evidence that in early 1991,

Cohen actively misled BCCU regarding the status of the New Adventures Realty Trust loan. Because the offense of conviction continued after November 1, 1990, the district court did not violate the ex post facto clause by applying § 2F1.1(b)(6)(A). See United States v. Arboleda, 929 F.2d 858, 870-71 (1st Cir. 1991).

Cohen argues that the relevant question is not when his offense of conviction ended, but whether any of his criminal acts after November 1, 1990 substantially jeopardized the safety and soundness of a financial institution. Assuming that Cohen has correctly framed the question, we think the four-level enhancement was still proper. By trying to throw BCCU and federal regulators off the scent, Cohen substantially jeopardized their ability to detect and recoup bad loans that BCCU had already made.

3. Double counting

Cohen argues that the district court engaged in improper "double counting" under the guidelines when it made upward adjustments for more than minimal planning (two levels), supervisory role (three levels), abuse of position of trust (two levels), jeopardizing the soundness of a financial institution (four levels), and the amount of loss (fifteen levels). "[I]n the sentencing context double counting is not rare -- and the practice is often perfectly proper." United States v. Pierro, 32 F.3d 611, 622 (1st Cir. 1994), cert. denied, 63 U.S.L.W. 3539 (1995). Cohen makes no effort to show that double counting in fact occurred, or that either "an explicit prohibition against double counting []or a compelling basis for implying such a prohibition exists" in his case. United States v. Lilly, 13 F.3d 15, 19 (1st Cir. 1994) (noting that "several [guideline] factors may draw upon the same nucleus of operative facts while nonetheless responding to

discrete concerns"). Accordingly, we deem the argument waived. Zannino, 895 F.2d at 17.

4. Obstruction of justice

Smith argues that the district court erred in making a two-level adjustment for obstruction of justice under U.S.S.G. § 3C1.1. The court based its decision on Smith's destruction of certain documents. According to Vasapolle, Smith stated that "he was going to burn [his closing books] in his fireplace." The government also recovered two pages from a document that Smith had thrown away, including the face page of a purchase and sale agreement on which the price had been changed with correction fluid. On these facts, the district court's finding that Smith in fact intentionally destroyed documents was not clearly erroneous.

Smith also argues that the documents he discarded were merely copies of other documents already obtained by the government, and therefore immaterial to his case. Smith overlooks the purchase and sale agreement, which is unique, material evidence of his participation in the bank fraud. See U.S.S.G. § 3C1.1, comment. (n.5) (evidence is material if it "would tend to influence or affect the issue under determination").

5. Downward departure

Smith argues that the district court should have considered a downward departure based on, among other things, the multiple causes of the monetary loss ascribed to him. Smith makes no claim that the district court mistakenly believed it lacked the authority to depart downward. We therefore have no jurisdiction to review its refusal to do so. United States v. Hernandez, 995 F.2d 307, 314 (1st Cir.), cert. denied, 114 S. Ct. 407 (1993).

6. Restitution

Devaney argues that the district court abused its discretion when it ordered him to pay restitution "not to exceed ten million dollars." The district court was required to consider the financial resources of the defendant and his earning ability, among other factors. See 18 U.S.C. § 3664(a); United States v. Springer, 28 F.3d 236, 239 (1st Cir. 1994).

In his allocution, Devaney attested to his past success as a developer of million-dollar properties. This implies substantial (if now diminished) earning ability. Although the court found that Devaney "doesn't have any money," it noted that Devaney had "ke[pt] his ill-gotten gains." Significantly, the exact amount and schedule of restitution were left open by the district court. In framing a flexible order that can respond to Devaney's changing financial status, the district court did not abuse its considerable discretion. See United States v. Lombardi, 5 F.3d 568, 573 (1st Cir. 1993).

III. CONCLUSION

The defendants' convictions and sentences are

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1327

UNITED STATES,

Appellee,

v.

ROBERT COHEN,

Defendant, Appellant.

Before

Torruella, Chief Judge,

Aldrich, Senior Circuit Judges,

Selya, Cyr, Boudin, Stahl, & Bownes, Circuit Judge

ORDER OF THE COURT

Entered: April 7, 1995

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc.

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By The Court

FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs Rankin and Wild]

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-10272-Y
	)	
ROBERT COHEN, ET AL	)	
	)	

DEFENDANT'S PRELIMINARY
MOTION FOR SEVERANCE

REQUEST FOR ORAL ARGUMENT

Oral Argument of this Motion is requested in accordance with Local Rule 7.1(c). It is anticipated that approximately 45 minutes will be required for each party to be heard.

The Defendant Attorney Robert Cohen moves for severance under Fed.R.Crim.P.14 and 12(b)(5) and his rights to due process of law, a fair trial, effective assistance of counsel and to present favorable evidence as protected by the Fifth and Sixth Amendments. To the extent not inconsistent

with the arguments made herein, he incorporates by reference the arguments made and authorities cited by codefendants in their motions for severance.

Because the grounds upon which this motion is based are evolving, this motion must be preliminary. The defense is still trying to examine the documentary evidence in the government's possession. The court has not ruled on discovery matters. There has been no disclosure of "other bad act" evidence under Fed.R.Evid.404(b) with respect to the various defendants. Only in his most recent filings did Devaney take the position that he would assert the attorney-client privilege as to conversations he had with Attorney Cohen. However, Attorney Cohen's trial strategy now appears sufficiently definite to make this filing to alert the court to the problem in a fairly comprehensive fashion.

The principal grounds asserted for severance are: (a) the likelihood of prejudicial spillover and confusion of evidence at a joint trial, (b) the availability of exculpatory evidence at a separate trial, and (c) the likelihood that assertion or waiver of the attorney-client privilege at a joint trial could lead to antagonistic defenses, mistrial, or undue prejudice.

The disparate quality and quantity of evidence and the likelihood of prejudicial spillover and guilt by association are such as to require severance. The government's anticipated proof will revolve around an alleged scheme in which defendants Devaney, Mangone and Smith borrowed millions of dollars from Barnstable Community Credit Union and/or Digital Employees Federal Credit Union to acquire a large number of properties for their own benefit by submitting false information regarding the value of the collateral and/or the creditworthiness of the nominal borrowers, while concealing from federal regulators that they held the beneficial interest

in the properties, in contravention of loan concentration limits.

In contrast, the evidence will show that Attorney Cohen's involvement was to act as closing attorney for usual compensation. There is nothing wrong with doing so, with representing both borrower and bank with disclosure and consent, or with using nominee trusts, indemnification agreements, and other documents. Attorney Cohen was not responsible for making lending decisions, for evaluating the collateral or the credit of the trustees, or for monitoring compliance with loan concentration limits. Attorney Cohen's responsibility to the bank was to make sure that the bank acquired a valid mortgage and to otherwise follow the instructions of the bank. There is no evidence that he violated any such instructions. There is and will be no evidence that Attorney Cohen was privy to the essence of the alleged fraud -- that Barnstable insiders, such as Vassapolle and others over whom Attorney Cohen had no control, orchestrated the creation, submission and retention of false documents such as inflated appraisals and false credit information which misrepresented the value of the collateral and the assets of the trustees, and false certificates of beneficial interest which misrepresented to and concealed from regulators the actual interests of Smith, Mangone and Devaney and the extent of their borrowings. Indeed, the evidence will show that none of these essentially fraudulent documents came from or passed through Attorney Cohen's office; and that the documents which did come from or pass through his office were bona fide.

It will be difficult enough for Attorney Cohen to get a fair trial based on the evidence admissible against him and to have a jury fairly determine whether his conduct violated the law, even at a separate trial. There is something of a

national hysteria to inflict punishment and blame for bank failures. There is also a strong likelihood that the government will argue and/or that the jury may assume that Attorney Cohen, as a lawyer, had an obligation or the ability to ferret out the fraud, and that his clients would have made full and complete disclosure to him of their plans and misdeeds. To dispel this notion, Attorney Cohen intends to call experts to testify to the proper role of an attorney in such transactions. All of this essentially exculpatory evidence may be obscured by the mass of inculpatory evidence against other codefendants at a joint trial. United States v. Ong, 541 F.2d 331, 336-8 (2d Cir. 1976). At a separate trial, Attorney Cohen would stipulate to much of the government's case, blunting its prejudicial and confusing tendencies, and greatly abbreviate any separate trial.

In addition to the "core" of evidence of alleged fraud by other defendants, it is likely that there will be additional evidence as against other defendants which will unfairly prejudice Attorney Cohen such as the alleged effort to obstruct justice by removing documents and doctoring the Barnstable files. Attorney Cohen never agreed to or participated in any removal of documents. The certificates of beneficial interest identifying the codefendants were not removed from his files. Attorney Cohen will testify that when the removal of documents was proposed, he responded that it was illegal and refused to participate. Such testimony from Attorney Cohen at a joint trial will be problematic, especially considering the attorney-client privilege claims that will be raised.[8/] Another fringe allegation not directed

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[8/] Attorney Cohen, through counsel, is presently attempting to secure affidavits from one or more codefendants attesting to Attorney Cohen's version of the facts. United States v. Drougas, 748 F.2d 8, 19 (1st Cir. 1984).

against Attorney Cohen is Mangone's violation of court orders in going on a gambling spree. This led the Court to comment that all criminal matters should be referred to another judge.[9/] Again, there is a real likelihood for guilt by association, and a risk that limiting instructions will not be sufficient to cure such prejudice.

The essence of Attorney Cohen's defense will be that he properly advised the bank, and his other clients, based upon the information which was provided to him. It will be critical to his defense to demonstrate the extent to which he was kept in the dark as to what was allegedly being revealed to or concealed from the regulators, the amount of indebtedness outstanding, and the chicanery in obtaining the loans. Much of this exculpatory evidence from Attorney Cohen's codefendants is likely to be unavailable at a joint trial, but could become available at a separate trial.[10/]

Whether tried jointly or separately, Attorney Cohen intends to testify. The presentation of Attorney Cohen's defense at a joint trial will be highly prejudicial to his codefendants. Attorney Cohen will testify that one of his codefendants essentially confessed to him in a meeting which

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[9/] See attached transcript Exhibit 1, received by defense counsel on December 29, 1992. Since the misconduct evidently had a profound effect on a seasoned trial judge, its likely effect on the jury would be all the more powerful. Insofar as the comments may indicate an appearance of partiality, recusal may be in order. Haines v. Liggett Group, 975 F.2d 81, 97-8 (3d Cir. 1992)[case reassigned where judge's rulings gave rise to an appearance of partiality]; United States v. Chantal, 902 F.2d 1018, 1023 (1st Cir. 1990)[disqualification under 28 U.S.C. § 455(a) can arise from judicial action where there is an appearance of bias as opposed to bias in fact].

[10/] See note 1, supra.

Attorney Cohen considered privileged; that this was his first knowledge of the fraudulent activities of the codefendants; that he consulted with experts in legal ethics as to his obligations and rights and was advised that he could not breach the privilege; and that he thereafter stopped working for the codefendants. This testimony will be devastating to the confessing codefendant as well as the other codefendants who were implicated by the confession.[11/] In balancing the competing interests of Attorney Cohen and his codefendants, it is likely that the trial judge will have to resolve difficult questions as to the scope and application of the attorney-client privilege.[12/] Doing so in the midst of a joint trial creates the real risk of a mistrial.

It is impossible to forecast at this point that evidentiary rulings and/or limiting instructions might fairly deal with these problems as fairly, efficiently and certainly as severance would.

[11/] The government would not be able to introduce this evidence at a joint trial. Bruton v. United States, 391 U.S. 123 (1968). In addition, severance may be required if Attorney Cohen testifies and the confessing codefendant exercises his right not to testify, so that Attorney Cohen's counsel can properly comment on that failure. DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962).

[12/] Should one or more of the codefendants attempt to proffer an advice of counsel defense at a joint trial through evidence or argument, that would further create a totally irreconcilable conflict between the defenses -- crediting Attorney Cohen's defense that he was kept in the dark would require the jury to disbelieve the codefendants' defense that he made full disclosure to and reasonably relied on advice of counsel, and vice versa. United States v. Serpoosh, 919 F.2d 835, 838 (9th Cir.v 1991); United States v. Romanello, 726 F.2d 123 (5th Cir. 1984); United States v. Porter, 764 F.2d 1, 12 (1st Cir. 1985).

For the above-stated reasons, Attorney Cohen submits that it would be more fair and efficient to separate his trial form that of his codefendants.

Respectfully submitted,

/s/_____
JACK I. ZALKIND
BBO No. 538840
15 Court Square
Boston, MA 02108
(617) 227-3950

Dated: January 4, 1993

I certify that I have served the foregoing by mailing postage prepaid to counsel of record this day.

/s/_____

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-10272-Y
	)	
ROBERT COHEN, ET AL	)	
	)	

MOTION FOR SEVERANCE NO. II

And now comes the defendant, Robert Cohen ("Cohen"), in the above-captioned action and respectfully requests that this Court sever his trial from that of the co-defendants. As grounds therefore, Cohen states that unless he is granted a severance, he will not be able to call, as a witness, co-defendant, James Smith, who will testify to evidence that is undeniably exculpatory. (See Affidavit of

James Smith (Exhibit A) and Defendant, Robert Cohen's Memorandum in Support of Motion for Severance No. II.)

Respectfully submitted,
Jack I. Zalkind & Associates

/s/

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April 10, 1993

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-10272-Y
	)	
ROBERT COHEN, ET AL	)	
	)	

FILED UNDER SEAL

DEFENDANT, ROBERT COHEN'S MOTION FOR RECONSIDERATION OF THE DENIAL OF HIS MOTIONS FOR SEVERANCE

ORAL ARGUMENT REQUESTED PURSUANT TO LOCAL RULE 7.1(D)

The defendant, Robert Cohen, moves that the court reconsider the denial of his motions for severance. He incorporates by reference his prior motions for severance and the arguments made therein, which he submits establish a sufficient basis for the court to exercise its discretion and

order a pretrial severance.[13/] This request for reconsideration is to further demonstrate that a refusal to sever pretrial will not only fail to achieve judicial economy and make it nearly impossible to give each defendant a fair trial but will also create a substantial risk that one or more mistrials may have to be declared during the trial. In that event, Attorney Cohen will oppose any mistrial during the trial on the ground that any "mainfest necessity" that may arise at trial was predicted and could have been avoided if a pretrial severance had been allowed by the court or agreed to by the government. Thus, the defendant submits that further prosecution would be barred by double jeopardy.

This is not the typical case where severance is requested because of antagonistic defenses, "tattling" or finger-pointing. It is not merely that Attorney Cohen will present an antagonistic defense. Attorney Cohen's co-defendants will be objecting and asserting a right, based on the attorney-client privilege, to prevent Attorney Cohen from pointing a finger at them and to thus prevent him from

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[13/] The defendants have, within the past few days, received Jencks material. After review of said material, and based upon further investigation, it has been learned that the key government witness, Lynn Vassapolle, ("Vassapolle") received undisclosed monies from many of the transactions as set forth in the indictment. It has been further learned that Vassapolle laundered monies through Barnstable Community Credit Union ("BCCU") so as to circumvent banking regulations. (Discovery has indicated that Vassapolle has denied these actions to government officials). This information is extremely exculpatory to Cohen and will be available to him only through the testimony of co-defendant, James K. Smith, who would, as previously stated, testify if called as a witness by Cohen at a separate trial. As a result of time constraints, we anticipate that James K. Smith's testimony will be memorialized in affidavit form and submitted in a timely fashion.

offering his defense.[14/] These will be difficult objections to resolve during trial, especially in those matters where there is no clear precedent. If the court upholds any of the co-defendants' objections, Attorney Cohen will be prevented from introducing impeachment exculpatory evidence and thus denied his due process right to present a full and effective defense. If the court rejects the co-defendants' objections and Attorney Cohen presents evidence concerning the same material, the jury will hear enormously prejudicial evidence about the co-defendants which would otherwise be unavailable to the government and wholly inadmissible at their trial. No matter which way the court decides, someone will have an appellate issue which we believe is more than harmless error. Again, there will be double jeopardy arguments against retrials.

While the problem will become most acute during Attorney Cohen's defense, the complication will arise repeatedly from the opening statements and throughout the government's case. What if one client objects to the opening statement being made by Attorney Cohen's counsel or to his cross-examination of a government witness on the ground that the opening or questioning is derived in whole or in part from Attorney Cohen's confidential communication with a client? What if the court finds a waiver as to one client but not another as to a particular disclosure, or if one client does not assert such a defense? Once a jury is jointly selected and a joint trial begins, all defendants will have a protectible

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[14/] Indeed, co-defendant Devaney, has recently filed a Motion in Limine of Seized Documents For Which Suppression is Sought in which he contends that the documents seized from Cohen's law office and designated by the government pursuant to their partial exhibit list are either attorney-client privileged or protected by the work product doctrine and should be suppressed along with any fruits of these documents.

interest in completing the trial before that jury. When (not if) the court decides at some point during a joint trial that a severance is required, which defendant gets to proceed before the original jury? These are not far-fetched hypotheticals, but bona fide predictions as to the type of problems that will confront the court. These decisions will be difficult enough to make if Attorney Cohen was being tried alone.[15/] However, at a separate trial, there would be no risk that a disclosure would be wrongfully admitted against a client who was a co-defendant.

Respectfully submitted,
Jack I. Zalkind & Associates

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[15/] Indeed, the court's resolution of these questions may adversely affect Attorney Cohen's defense since these decisions may conflict with Attorney Cohen's anticipated evidence that he was advised that he was ethically prohibited from making such disclosures.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 92-10272-Y
	)	
ROBERT COHEN, ET AL	)	
	)	

FILED UNDER SEAL

DEFENDANT, ROBERT COHEN'S SUPPLEMENTAL MOTION FOR SEVERANCE BASED UPON AFFIDAVIT OF JAMES K. SMITH NO. II

REQUEST FOR ORAL ARGUMENT

Now comes the defendant, Robert Cohen ("Cohen"), in the above-captioned action and respectfully requests that this Court sever his trial from that of the co-defendants. In support of this motion, Cohen incorporates the factual and legal arguments as set forth in Defendant, Robert Cohen's Memorandum in Support of Motion for Severance No. II.

As further grounds therefor, Cohen states that unless he is granted a severance, he will not be able to call, as a witness, co-defendant James K. Smith, who will testify to evidence that is undeniably exculpatory for the reasons set forth hereinbelow. (See Affidavit of James K. Smith No. II attached hereto).[16/]

The substance of Smith's testimony further expands upon his earlier, original Affidavit, and not only contradicts the government's basic allegation that Cohen, in concert with others, defrauded BCCU and DEFCU, but also specifically impeaches the government's key witness, Lynn Vasapolle ("Vasapolle").

Specifically, paragraph 1 of Smith's Affidavit directly rebuts the allegations set forth in paragraphs 16 and 23 of Count I of the indictment. Indeed, Smith's testimony specifically indicates that Cohen did not have the specific intent to defraud BCCU, DEFCU and Federal examiners and, instead, was explicitly directed not to send the Certificates of Beneficial Interest to BCCU along with the other closing documents. This evidence is exculpatory to Cohen, impeaches Vasapolle, and only available through Smith.

Paragraph 2 of Smith's Affidavit directly refutes the government's contention that Cohen acted surreptitiously. Indeed, Smith's testimony establishes that Cohen had a complete understanding of the law and explained the various ramifications to Vasapolle and some of the co-defendants.

[16/] The Affidavit of James K. Smith, which accompanies this motion is that which was specifically referred to in Defendant, Robert Cohen's Motion for Reconsideration of the Denial of his Motion for Severance.

Likewise, paragraph 3 of Smith's Affidavit impeaches Vasapolle. This testimony is only available through Smith, as nowhere in the discovery material provided to date, does Vasapolle admit that she altered or removed documents.

Paragraph 4 of Smith's Affidavit explains Cohen's involvement with New Adventures Realty Trust. This testimony is highly exculpatory to Cohen as Smith is the only individual available to explain why Cohen and his wife acted as beneficiaries for a short period of time. Further, Smith's testimony impeaches Vasapolle's testimony as set forth on page 18 of her June 12, 1991, interview attached hereto as Exhibit "A".

Finally, paragraph 5 of Smith's Affidavit impeaches Vasapolle and is in direct contravention with the letter of her attorney, Gary Crossen, Exhibit "B", wherein nowhere does Vasapolle admit to receiving large amounts of monies for her personal use over and above here salary and benefits.

The evidence set forth and encompassed in Smith's Affidavit No. II is both exculpatory and testimony that Cohen needs to present a proper defense. Cohen has complied with each and every requirement for a severance as set forth in U.S. v. Drougas, 748 F.2d (1st Circ. 1964) and its progeny. As this Court has stated, "A defendant is entitled to as fair a trial as normally can be given."[17/]

[17/] Vasapolle Change of Plea, May 12, 1993.

Accordingly, it follows that Cohen's supplemental motion for severance should be granted and his trial should be scheduled following the trial and disposition of defendant Smith.

Respectfully submitted,
Jack I. Zalkind & Associates

/s/

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APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR. No. 92-10272-Y
V.	)	
	)	
ROBERT COHEN, ET AL	)	

AFFIDAVIT OF JAMES K. SMITH

1. I, James K. Smith, do hereby state that sometime after the NCUA placed BCCU under its conservatorship and prior to March 23, 1991, at a discussion in Barnstable amongst Lynn Vassapolle ("Vassapolle"), Richard Mangone ("Mangone"), Michael O'Neil (O'Neil), Robert Cohen ("Cohen") and me, Cohen told all present that no documents, under any circumstances, could be removed from any files or offices since this would be a violation of law.

2. On or about March 23, 1991, during a discussion at Cohen's office in Wellesley, MA between Vassapolle, Mangone, (O'Neil by telephone), myself and Cohen, Cohen explained to all present that

no files should or would be altered or removed from this office, as it would be a serious obstruction of justice.

3. I know of no agreement, specific or implied, wherein Cohen agreed to provide documentation to BCCU and Digital that he knew was prepared in such a way so as to conceal from the Federal examiners, auditors, officials and directors of Digital or BCCU, the true recipients of monies borrowed from either BCCU or Digital.

4. During all of the closing [sic] I attended involving various trustees, Cohen specifically informed the trustees that they were personally liable for repayment of funds borrowed in their names. Cohen informed the trustees that although the beneficiaries were providing them with Indemnification Agreements, they would still be personally liable for these loans. At no time did I ever hear Cohen inform a trustee that they would not be personally responsible nor was he ever told by me or by any of the other beneficiaries in my presence to give such information.

5. Whenever there was a sale from one trust to another, Cohen insisted that tax stamps reflecting the amount of the sale from one to another had to be paid to the Commonwealth.

6. At no time did Cohen, Bornstein & Cohen or Cohen & Kushner ever do any free legal work for me or to the best of my knowledge for Mangone. Indeed, Cohen was scrupulous in billing us for any legal business that he handled on our behalf, individually, or through any of business entities.

7. I would be willing to testify to the aforementioned information contained within this Affidavit at a separate trial in which Cohen would be the defendant, and I would appear as a witness. I would do this after the trial of my case whether I am found guilty or not or whether there is a change of plea.

The aforementioned information is true to the best of my belief and knowledge and is submitted under the pains and penalties of perjury on this 7th day of April, 1993.

/s/_____

James K. Smith

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR. No. 92-10272-Y
V.	)	
	)	
ROBERT COHEN, ET AL	)	

AFFIDAVIT OF JAMES K. SMITH NO. II

On April 7, 1993, I signed an Affidavit which, I understand, was submitted to this Court. Since that time, I have reviewed more of the discovery material as well as the government's exhibit list and other materials, and I hereby state that at a separate trial of the defendant, Robert Cohen, ("Cohen") after the trial of my own case, whether or not I am found guilty or whether I have a change of plea, or I am sentenced, I will testify to the following, in addition to those items that I specified in my first affidavit:

1. I have personal knowledge that Robert Cohen sent closing packages to Lynn Vasapole ("Vasapolle") which included copies of the Certificates of Beneficial Interest in which the names of some of the co-defendants were included.

Further, I am personally aware that, in or about 1989, after the receipt of those documents, Vasapolle informed Cohen that in the future, the Barnstable Community Credit Union ("BCCU") would not be requiring the Certificate of Beneficial Interest or the Indemnification Agreements be included in the closing documents Cohen forwarded to BCCU. Vasapolle further informed Cohen that the only closing documents that he should forward to BCCU were the documents filed at the Registry of Deeds as well as other insurance and closing documents which did not indicate the beneficiaries.

2. [S]ometime in 1985, Cohen told Mangone, Vasapolle, and myself that, in his opinion, a Massachusetts Nominee Trust allowed the Trustee to borrow monies from a bank in his name as Trustee. Furthermore, Cohen informed us that the Trustee could only act under the specific direction of the beneficiaries, who were told him in most instances were going to be Mangone, myself and/or Ambrose Devaney ("Devaney"). Cohen also told us that under these conditions the beneficiaries would have to be subject to the tax consequences on losses or gains that were realized from the operation of the Trust.

3. Furthermore, in addition to the facts as stated concerning my first Affidavit, I further state that despite the instructions from Cohen Vasapolle would alter and remove files from BCCU.

4. I have personal knowledge that Cohen and his wife acted as temporary beneficiaries of the New Adventures Realty Trust only as an accommodation to the co-defendants, since at that time, Devaney was trying to extricate himself from the Trust. This took place in 1989 and not on March 1991, as Vasapolle has stated to the government.

5. I have personal knowledge that in addition to the salary and bonuses that Vasapolle received from the Credit

Union, she also received large amounts of monies from one of the co-defendants for her personal use after many of the loans involving the various Trusts closed and the proceeds were distributed.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY ON THIS DAY OF MAY, 1993.

/s/_____

James K. Smith

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR. No. 92-10272-Y
V.	)	
	)	
ROBERT COHEN, ET AL	)	

DEFENDANT, ROBERT COHEN'S RENEWED MOTION FOR SEVERANCE BASED UPON PREVIOUSLY SUBMITTED AFFIDAVITS OF JAMES K. SMITH

ORAL HEARING REQUESTED

And now comes the defendant, Robert Cohen, in the above-mentioned case and renews his previously filed motions for severance. Defendant incorporates and adopts the arguments as previously set forth.

As grounds therefor, defendant states that a severance is warranted based upon the trial testimony of Lynn Vasapolle. Said testimony can only be contradicted and impeached by James K. Smith who would testify for

defendant, Robert Cohen, if Cohen's case were severed from the trial of James K. Smith.

Respectfully submitted,

/s/_____

Jack I. Zalkind
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APPENDIX J

During the course of the trial I became aware of a ruling by Judge Young to the effect that he would allow into evidence, the conversation which I had with Dean Huber. Because of this Ruling by Judge Young, I elected not to testify. Had I known that my testimony was required in order to permit Dean Huber to testify to what I told him, I would have chosen to testify on my own behalf.

Signed under the pains and penalties of perjury on this 30th Day June 1993.

/s/_____

Robert Cohen

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	CR. No. 92-10272-Y
V.	)	
	)	
ROBERT COHEN, ET AL	)	

AFFIDAVIT OF DEFENDANT ROBERT COHEN IN SUPPORT OF HIS PRELIMINARY MOTION FOR NEW TRIAL

Now comes Robert Cohen, first being duly sworn, who deposes and states as follows:

1. I submit this affidavit in support of my Preliminary Motion for a New Trial and base same in part upon portions of the trial transcript I have been provided, upon my best recollection as to events which transpired at trial, and in part upon my June 30, 1993, affidavit.

2. Although I was present in Court throughout the trial, I was not at side bar conferences; therefore, my recollection of events is based upon what I heard in open

Court on the record and for this reason, this affidavit is necessarily submitted preliminarily until such time as I have had an opportunity to obtain and review the trial transcript, most of which is still unavailable.

3. During the course of this trial, my counsel proffered the testimony of Richard G. Huber ("Professor Huber"), a professor of law at Boston College School of Law who teaches among other courses, professional responsibility (A complete copy of Professor Huber's testimony is attached as EXHIBIT A to the accompanying Memorandum).

4. Professor Huber testified that some time in the latter part of March or early April 1991, I had contacted him seeking advice about a matter which I considered to be a serious ethical problem facing me (EXHIBIT A, p.2-4).

5. Professor Huber stated that he in fact met with me to discuss my concerns on April 4, 1991 (Tr. 4).

6. The Professor also testified that, at this meeting, I informed him that I was distressed about a situation that had arisen (EXHIBIT A, p. 19).

7. In particular, Professor Huber testified that I explained that I had been the lawyer for a lending institution and that on March 23, 1991, a former officer, director and manager of that institution had come to me disclosing illegal activities they had undertaken while working for that institution (EXHIBIT A, p. 5), all of which related to the offenses charged.

8. The three persons referred to were co-defendants Smith and Mangone, and a chief government witness, Lynn Vasapolle.

9. Professor Huber testified that I said that certain of their actions entailed the changing of documents, information,

data, and figures on legal documents after I had completed and submitted them to these persons for the institution's use (EXHIBIT A, pp. 5-6).

10. Professor Huber further testified that I also stated that there was a possibility that these individuals had forged signatures on some documents, that false documents may have been placed in the institution's files and that illegal loans may have been given (EXHIBIT A, pp. 6,10).

11. According to the Professor, the primary questions I posed were whether I could reveal any of this information which had been received from these three persons, two of whom were presently clients, to my other client, the lending institution, and what my responsibilities were to this latter client (EXHIBIT A, pp. 6,8).

12. Professor Huber stated that he advised that under the circumstances, unless I was forced to protect myself in a civil or criminal matter, I could not reveal anything which I had been told by the tree individuals (EXHIBIT A, pp. 6-8).

13. This evidence, which was critical to the defense, was offered not for its truth, but to show that the statements were made, all for purposes of establishing my state of mind relative to the offense charged.

14. It was essential to my defense that the jury hear my precise words in order to understand my state of mind; that is, I had sought out the advice not as a criminal anxious to conceal my behavior, but as a law-abiding member of the bar determined to comply with my legal obligations, the purpose of which was to show the jury that I did not have the specific intent to commit the offenses with which I had been charged.

15. Another witness, Donna Turley, from the Massachusetts Bar Association also testified that I had consulted her concerning an ethical problem.

16. She could not remember what I had told her, but only the advice she had given, which was that I could not disclose any client confidences.

17. All of the co-defendants filed Bruton objections relative to the Huber testimony in addition to Motions for Severance, which Motions I understand are still pending before the Court.

18. Over those co-defendants' Bruton objections, this Court, in fact, admitted the statements I had made to Professor Huber not for their truth, but upon the basis that they went to my state of mind (EXHIBIT A, p.5).

19. None of the co-defendants examined Professor Huber (EXHIBIT A).

20. The Court never conditioned the admission of this evidence upon my testifying.

21. At the time of the close of the evidence, Professor Huber's testimony remained intact as initially admitted.

22. It was for this very reason that I in fact elected not to testify as the Court and jury were initially told, and the Court was informed of my decision not to testify before my counsel rested on my behalf (A copy of my June 30, 1993, Affidavit, previously filed with the Court is attached as EXHIBIT B to the accompanying Memorandum).

23. It was only after closing arguments had begun, and just prior to my counsel's closing, that I was made aware by the Court that my statements to the Professor were being stricken due to a supposed Bruton problem, that the jury was

to be instructed to disregard them, and that my counsel could not rely upon them in arguing to the jury.

24. At no time prior to this had I been advised that the Court was even contemplating such specific action.

25. Had I known that my testimony was required, I definitely would have taken the stand in my own defense (EXHIBIT B).

26. The jury was instructed to disregard only that portion of Professor Huber's testimony which involved my statements to the Professor as testified to on direct.

27. No explanation of any kind was given as to why the evidence was being stricken, and the jury was not instructed to disregard the Professor's testimony on cross-examination.

28. The thrust of that cross-examination was directed at what I did not tell the Professor, implying that I was somehow covering up my own involvement in the crimes (EXHIBIT A, pp. 9-18).

29. The only other significant evidence stricken at trial concerned that of an FBI clerk, Tracy Downs ("Downs").

30. She had testified that files seized from my office had not been reviewed by anyone after August 4, 1992.

31. Following this testimony my counsel uncovered evidence which proved that her testimony was false, and the U.S. Attorney's office provided counsel with a letter to this effect (A copy of that letter is attached as EXHIBIT C to the accompanying Memorandum).

32. The Court provided this letter to the jury as explanation for why the Downs testimony was being excluded.

33. The Court allowed into evidence certain testimony of Irene Petri, an employee of my law firm, relative to a statement I made following the government's seizure of files from my law office.

34. In particular, Ms. Petri testified that the day after the FBI had seized those files, I had stated words to the effect "thank God, they'll know the truth now".

35. Prior to trial, my counsel had filed numerous motions with the Court seeking severance of my trial from that of my co-defendants (See Defendant's Preliminary Motion for Severance dated January 4, 1993; Motion for Severance No. II dated April 12, 1993; Defendant Robert Cohen's Additional Memorandum Regarding Preliminary Motion for Severance dated April 23, 1993; Defendant Cohen's Supplemental Memorandum in Support of Motion for Severance dated April 28, 1993; Defendant, Robert Cohen's Motion for Reconsideration of the Denial of His Motions for Severance dated May 4, 1993; and Defendant Robert Cohen's Supplemental Motion for Severance Based Upon Affidavit of James K. Smith No. II dated May 12, 1993).

36. These Motions were renewed continually throughout the trial and continually denied.

37. Each Motion raised as bases for severance possible Bruton issues, antagonistic defenses, and the fact that evidence exculpatory as to me would only be available from a co-defendant who agreed to testify in a separate trial (Copies of co-defendant Smith's two (2) affidavits previously filed with the Court are attached as EXHIBIT D to the accompanying Memorandum).

38. That co-defendant was James K. Smith ("Smith"), whose affidavits submitted in support of my motions show

that, he had testified at a separate trial on my behalf, he would have provided testimony substantially exculpatory of me and would have directly contradicted a chief government witness, Lynn Vasapolle ("Vasapolle").

39. As a result of my conviction, I have presently been prohibited from practicing before the federal court.

40. State proceedings are currently pending and a hearing is scheduled to be held before Justice O'Connor concerning efforts to temporarily disbar me from practicing in state court in light of this conviction as well.

SIGNED UNDER THE PENALTIES OF PERJURY THIS 9th DAY OF AUGUST 1993.

/s/
ROBERT COHEN